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SUPREME COURT, U.S.**

(F-162)

IN THE
Supreme Court of the United States

October Term, 1975

GRIFFIN, INC.,

Appellee,

against

**JAMES H. TULLY, JR., A. BRUCE MANLEY, MILTON
KOERNER, FRANCIS X. MALONEY and
JOHN WILLEY,**

Appellants.

JURISDICTIONAL STATEMENT FOR APPELLANTS

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JAMES H. TULLY, JR., A. BRUCE MANLEY,
MILTON KOERNER, FRANCIS X. MALONEY
and JOHN WILLEY,

Appellants.

Jurisdictional Statement for Appellants

Appellants appeal from a judgment and order of the United States District Court for the District of Vermont (statutory three-judge court) entered October 20, 1975, which denied appellants' motion to dismiss the case, on the grounds that the United States District Court should not enjoin, suspend or restrain the assessment, levy, or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state; and which order temporarily enjoined the appellants from attempting to collect the tax assessed against the appellee and ordered the appellants to revoke the notice of assessment and hold further collection proceedings in abeyance pending a determination of the matter on the merits by the United States District Court.

Opinion Below

The opinion of the three-judge court dated October 20, 1975 is unreported and is reproduced as Appendix A to this statement.

Jurisdiction

The judgment of the three-judge court was entered on October 20, 1975. The notice of appeal was served on November 7, 1975 and is reproduced herein as Appendix B.

The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. § 1253.

This Court has jurisdiction because the two basic criteria for direct appeal from a three-judge United States District Court have been met: (1) Under 28 U.S.C. § 2281 the action appellee brought for a preliminary injunction was required to be heard and determined by a three-judge district court. In the complaint the appellee sought preliminary and permanent injunctions against the application of basic statewide taxing statutes. The appellee sought a declaratory judgment that any assessment, levy, or collection against it would violate the Commerce, Due Process, and Equal Protection clauses of the United States Constitution. The appellee also sought permanent injunctive relief. (2) A preliminary injunction was granted after notice and hearing. Where a state statute is challenged, denial of a motion to dismiss for lack of subject matter jurisdiction and the granting of a preliminary injunction constitute the granting of an interlocutory injunction for the purposes of 28 U.S.C. § 1253. *Cf. Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972), in which the appellant sought a declaratory judgment and injunctive relief against the Household Finance Corporation on a promissory note and on the constitutionality of State garnishment laws. The Federal District Court dismissed the action for lack of

jurisdiction. The United States Supreme Court noted probable jurisdiction under 28 U.S.C. 1253.

The three-judge Court below held that an injunction should be granted and that the appellants' motion to dismiss for lack of subject matter jurisdiction made in reliance on 28 U.S.C. § 1341 should be denied on the grounds that the remedies available to the appellee under New York State statute and law were not plain, speedy and efficient within the meaning of 28 U.S.C. § 1341.

Statute Involved

Title 28 U.S.C. § 1341:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Question Presented

Was the Court below in error when it determined that the two alternate methods of relief open to appellee for reviewing the applicability of the New York State Tax Law to its business provided for under New York Law, *i.e.*, *A.* Administrative and judicial review of the Tax Commission's decision as provided for by Article 78 of the New York Civil Practice Law and Rules and *B.* An action for a declaratory judgment in the courts of the State of New York, were not plain, speedy, or adequate remedies for the appellee within the meaning and intent of 28 U.S.C. § 1341?

The three-judge District Court below held that neither is plain, speedy and efficient within the meaning of 28 U.S.C. § 1341.

Nature of the Case

The appellee is a Vermont corporation which has a place of business in Arlington, Vermont. It is engaged in the retail sale of furniture and gift shop items. A substantial portion of the appellee's sales are made to persons who are not residents of Vermont. Appellee's store is located approximately 25 miles from the Massachusetts-Vermont border and approximately 6 miles from the New York-Vermont border. A large portion of these interstate sales are to residents of New York State. The New York State sales tend to be concentrated in the Albany-Schenectady-Troy area which is fairly close to New York border, although sales are made on occasion to other parts of the State of New York.

Some of the articles purchased from the appellee by New York State residents are carried away from the store by the residents and some articles (particularly when furniture is involved) are delivered to New York in trucks owned by the appellee. Such deliveries are made by employees of the appellee and since the furniture sometimes requires assembling or setting up, such as the attachment of legs to a table, it makes it impractical to use common carriers to deliver furniture.

The appellee's advertising reaches into New York State. It advertises through advertising media located in the Albany-Schenectady-Troy area of New York and includes radio advertising, television advertising, newspaper advertising and a roadside sign located on a New York highway. The facilities for the radio and television stations are located entirely within New York State. Appellee's newspaper advertising is in a weekly joint television listing section of two newspapers which are published in Albany, New York and which are circulated primarily in the Albany-Schenectady-Troy area of New York.

The appellee also sends repairmen into New York State to service complaints. No charge is made for such repair service when it is done.

Based upon the contacts that the appellee has with New York State, the appellants, to determine if the appellee is a vender as defined by section 1101(b)(8)(.) of the Tax Law of the State of New York and to determine if the appellee is liable for the duties of a vendor as set forth in the provisions of section 1105(a), 1105(c)(3), 1131(1), 1132(a), 1133(a), 1134 and 1135 of the Tax Law of the State of New York (Appendix C) in regard to the collection and remittance of sales tax to the State of New York on those sales of tangible personal property delivered by it into New York State, sent a tax examiner to the appellee's place of business in Vermont to examine the appellee's books and records in order to determine if any sales tax was owed by the appellee to the State of New York. The examiner was denied access to the appellee's records and books.

On April 23, 1975, the appellants again went to the appellee's place of business to conduct an audit and appellee again refused to permit an audit and served the tax examiner with the complaint which commenced the present lawsuit.

The appellee brought an action in the United States District Court for the District of Vermont seeking a declaratory judgment that any assessment, levy, or collection against it would violate the Commerce, Due Process and Equal Protection clauses of the Constitution. The appellee also sought injunctive relief.

The appellants moved to dismiss on the grounds that "the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State" (28 U.S.C. § 1341).

A three-judge court was convened and a hearing was held on August 1, 1975.

The three-judge court by judgment and order dated October 20, 1975, denied the appellants' motion to dismiss and

granted the appellees a temporary injunction enjoining the appellants from attempting to collect the tax assessed against the appellee and ordered the appellants to revoke the notice of assessment dated August 8, 1975 and hold further collection proceedings in abeyance pending a determination of the matter on the merits.

This appeal by appellants is from that judgment and order and is pursuant to the provisions of 28 U.S.C. § 1253.

ARGUMENT POINT I

Since the appellee has a plain, speedy and efficient remedy in the courts of the State of New York, the Court below erred in not dismissing the action for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1341.

The appellee in its complaint sought to have the appellants enjoined in the enforcement and execution of various provisions of the New York State Tax Law.

However, Title 28 U.S.C. 1341 provides:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

This restriction upon the power of the United States District courts in enjoining the enforcement of state tax laws has been interpreted on numerous occasions by this Court. In *Matthews v. Rogers*, 284 U.S. 521 (1932), this Court said:

"The scrupulous regard for the rightful independence of state governments which should be at all times actuate the federal courts and a proper reluctance to interfere by injunction with the fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, the Court has uniformly

held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the Courts, of the United States. If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts, from which the complaint may be brought to this Court for review if a federal questions be involved."

In *Great Lakes Co. v. Huffman*, 319 U.S. 293 (1943) this Court held:

"... it is the Court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes." *Id.* at 300-301 (emphasis supplied).

Accordingly, although the District Court's exercise of discretion in actions seeking equitable relief is undeniably broad, this Court in *Great Lakes Co. v. Huffman*, *supra*, made it abundantly clear that "it is the Court's duty to withhold such relief" under the Johnson Act, *Great Lakes Co. v. Huffman*, 319 U.S. 293, 300. As the Court in *City of Houston v. Standard-Triumph Motor Company*, 347 F. 2d 194 (5th Cir. 1965), cert. den. 382 U.S. 974 (1966) quite properly observed:

"Certainly, after emphasizing the pre-Johnson Act equitable limitations congressionally approved and strengthened by that enactment, it is inconceivable that the Supreme Court intended to allow any discretion to grant declaratory relief where adequate state remedies were available." *Id.* at 199.

Accordingly, the propriety of the consideration of the Court below should have revolved around the question of whether or not the legal remedies afforded to the appellee by New York State are plain, speedy and adequate.

It is submitted that the legal remedies provided by New York State are plain, speedy and adequate.

The State of New York provides the appellee with two methods of relief. One is by way of—judicial review of the administrative agency and the other is by declaratory judgment.

A. Administrative Remedies

New York Tax Law, § 1138, provides for a state administrative review by the State Tax Commission. A hearing is provided before the State Tax Commission and judicial review of the determination of the State Tax Commission is specifically authorized by Tax Law, Article 28, by way of a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules.

The Federal Courts have repeatedly found the available state tax remedies by way of Article 78 review to be adequate. See *Amer. Commuters Ass'n. v. Levitt*, 279 F. Supp. 40 (S.D.N.Y., 1967), affd. 405 F. 2d 1148 (2d Cir., 1969); *Heckman v. Wujick*, 333 F. Supp. 1221 (E.D.N.Y., 1971); *Collier Advertising Service v. City of New York*, 32 F. Supp. 870 (S.D.N.Y., 1940). As the Court in *Collier* noted at 872:

"Art. 78 * * * provides for review in the nature of the old time certiorari proceeding, for a stay * * * for a raising of constitutional and jurisdictional questions * * * [and] for restitution * * *"

It should be noted that the appellee in the present case has not only not exhausted its administrative remedies but it has not even begun its administrative remedies.

The appellee contended in the Court below that it should not have to use the administrative remedies available to it because the remedies are not plain, speedy or efficient. This conclusion is based on the argument that the appellee will have to post a bond or pay the assessment before it can com-

mence a proceeding under Article 78 of the Civil Practice Law and Rules to review a decision of the New York State Tax Commission that it is subject to taxes.

The flaw in this reasoning is that the appellee is presupposing that it will not be successful at a formal hearing held before the New York State Tax Commission.

The New York State Tax Commission has the obligation to hold formal hearings and evaluate all of the evidence submitted at the hearing. Its determination must be based upon the evidence presented. The appellee will be given a hearing at which it may present any and all evidence to support its position that it is exempt from taxation by New York State. If it sustains its position that it is exempt from taxation by New York State, the New York State Tax Commission will grant it the exemption and thus end the entire proceeding. It is not required that the appellee pay the tax or post a bond prior to receiving a formal hearing. The whole matter could be resolved at no more expense than it would cost to appear at a hearing and produce evidence to support its position. The only time that the appellee must post a bond is if the New York State Tax Commission rendered a determination adverse to the appellee and the appellee commenced an Article 78 proceeding to review the determination of the State Tax Commission.

In the event that the appellee pays the tax and it is decided that it is exempt from taxation, the appellee's payment would be refunded with interest at the rate of six percent *per annum* upon such payment as is authorized by New York Tax Law § 1139(d). See *Matter of Brodsky v. Murphy*, 25 N Y 2d 518, 522 (1971).

It is submitted that the appellee has a plain, speedy and adequate remedy under the administrative-judicial review remedy provided by the laws of the State of New York.

B. Declaratory Judgment

(1)

New York Civil Practice Law and Rules, § 3001, provides for actions for declaratory judgment in the New York State Supreme Court in regard to the applicability or constitutionality of the Tax Laws of the State of New York. The courts of New York have held that "an action for a declaratory judgment may be maintained, despite the provisions of a taxing statute which provides that the method of judicial review presented therein shall be exclusive, where the jurisdiction of the taxing authorities is challenged on the ground that the statute is unconstitutional or that the statute by its own terms does not apply in a given case". *In the Matter of First National City Bank v. City of New York Finance Administration*, 36 N. Y. 2d 87 (1975); *Richfield Oil Corporation v. City of Syracuse*, 287 N.Y. 234, 239 (1942); see also *Dun & Bradstreet, Inc. v. City of New York*, 276 N.Y. 198, 206 (1937); *Socony-Vacuum Oil Co. v. City of New York*, 247 App. Div. 163 (1st Dept., 1936), affd. 272 N.Y. 668 (1936); *Yonkers Raceway Inc. v. City of Yonkers*, 66 Misc. 2d 589, 593 (Sup. Ct., West. Co., 1971). These cases permitting declaratory judgment actions in cases of municipal taxation have been held applicable to state taxation as well. *Hudson Transit Lines, Inc. v. Bragalini*, 11 Misc. 2d 1094, 1096-7 (Sup. Ct., N.Y. Co., 1958); see also *Peters v. Tax Commission*, 18 A D 2d 880 (1st Dept., 1963), affd. 13 N.Y. 2d 1148 (1964).

The New York State Court of Appeals in the most recent case of *Slater v. Gallman, et al.* N.Y. 2d (decided November 20, 1975) held:

"To be sure, a tax assessment may be reviewed in a manner other than that provided by statute where the constitutionality of the statute is challenged or a claim is made that the statute by its own terms does not apply (*First Nat. Bank v. City of New York*, 36 NY2d 87, 92-93;

Richfield Oil Corp. v. City of Syracuse, 287 NY 234, 239) and where the assessment is wholly fictitious and is made without any factual basis solely to extend a period of limitations (*Brown v. New York State Tax Comm.*, 199 Misc 349, 353-354, affd 279 App Div 837, affd 304 NY 651)."

In the recent case of *Hospital Television Systems, Inc. v. New York State Tax Commission*, 41 A D 2d 576 (3d Dept., 1973), affd. 36 N.Y. 2d 746, a case which challenged a decision of the State Tax Commission and which involved the question of the constitutionality of the application of section 1138 of the New York Tax Law (the same section of the Tax Law which the appellee contends is being unconstitutionally applied to it), the New York State Appellate Division, Third Department, said:

"Section 1140 of such tax law states that the remedies provided by section 1138 are exclusive. It is well recognized that when a taxing authority jurisdiction is challenged on the ground that the statute is unconstitutional or inapplicable, resort need not be had to the method of review prescribed in the taxing statute (*Richfield Oil Corp. v. City of Syracuse* 287 N.Y. 234, 239.)"

The New York State Court of Appeals in the recent case of *First National City Bank v. City of New York*, 36 N.Y. 2d 87 (1975), said at page 92:

"When a tax statute, however, is alleged to be unconstitutional, by its terms or application, or where the statute is attacked as wholly inapplicable, it may be challenged in judicial proceedings other than those prescribed by the statute as 'exclusive'; the invalidity or total inapplicability affects the entire statute, including the limitations and restrictions on the remedy provided in it (see *Richfield Oil Corp. v. City of Syracuse* 287 N.Y. 234, 239; *Dun & Bradstreet v. City of New York* 276 N.Y. 198, 206-207; *Secony-Vacuum Oil Co. v. City of New York* 247 App. Div. 163, 166-167, affd. 272 N.Y. 668)."

The Federal courts have also held that the action for declaratory judgment in the State of New York is a plain, adequate and speedy remedy.

In the recent case of *Ammex Warehouse Co., Inc., et al. v. Gallman, et al.* (unreported, N.D.N.Y. 72 Civ. 306; 72 Civ. 310), affd. 414 U.S. 802 (1973), in which the plaintiffs brought an action in the Federal Court to have New York State Tax Law, § 1138 declared unconstitutional as applied to plaintiffs, the three-judge court in a memorandum decision by Judge Kaufman held:

**** we are of the view that at this juncture we are without jurisdiction to consider this claim. Congress has provided that 'The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.' 28 U.S.C. § 1341. We believe such a remedy is available in the New York courts. N.Y. Civil Practice Law and Rules § 3001 (McKinney's 1970) provides that the state supreme court may issue declaratory judgments. There is ample authority that a declaratory judgment action may be employed to challenge imposition of a tax. See, e.g., *Richfield Oil Corp. v. City of Syracuse*, 287 N.Y. 234 (1942); *Hudson Transit Lines, Inc. v. Bragalini*, 172 N.Y.S. 2d 423 (Sup. Ct. 1958). Accordingly, Ammex may present its arguments in the state supreme court and seek a declaratory judgment from that court that application of these taxes to Ammex's export operations is unconstitutional." The parties could seek ultimate review in the United States Supreme Court. 28 U.S.C. § 1257. We find unpersuasive Ammex's contention that the apparent inability of the state supreme court to issue an injunctive order barring collection by the State Tax Commission pending a final decision renders a declaratory judgment action inadequate under 28 U.S.C. § 1341."

For the Court's convenience, a copy of the district court's memorandum decision in the *Ammex* case, is attached as Appendix D to this statement. See also the case of *West*

Publishing Company v. McColgan, 138 F. 2d 320 (C.C.A. 9th Cir., 1943), where plaintiff who was not qualified to do business in California and who had no property in California, brought an action for declaratory judgment in the Federal court to declare California's corporation income tax void as denying due process of law and imposing a burden upon interstate commerce. The Federal court held that the action was not within the jurisdiction of the Federal District Court where the California law provided an adequate remedy in its State Courts.

(2)

Although the appellee has a right to a declaratory judgment in the courts of the State of New York, it inferred in the Court below that an action for a declaratory judgment in the State courts is not adequate because the appellee could not get injunctive relief pending the final determination by New York's highest court, the Court of Appeals.

Under the provisions of section 6301 and 6311 of the New York Civil Practice Law and Rules, the appellee could obtain a preliminary injunction against the appellants to enjoin the appellants from collecting taxes pending a determination of the case by the State courts where circumstances warrant.

Section 6301 of the New York Civil Practice Law and Rules reads as follows:

"Grounds for preliminary injunction and temporary restraining order. A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

A preliminary injunction may be obtained against State officials as long as the officials are put on notice that the appellee is making a motion for a preliminary injunction or temporary restraining order (cf. *McArdle v. Comm. of Investigation*, 41 A D 2d 401 [3d Dept., 1973]).

It is therefore possible for the appellee to obtain the injunctive relief that it seeks in the courts of the State of New York.

The dual remedies of a declaratory judgment action and administrative agency review have been held to constitute an adequate review for purpose of invoking the dictates of the Johnson Act (28 U.S.C. 1341). *American Commuter Ass'n v. Levitt*, 279 F. Supp. 40 (S.D.N.Y. 1967), aff'd 405 F. 2d 1148 (2d Cir. 1969); *Hickman v. Wujick*, 333 F. Supp. 1221 (E.D.N.Y. 1971); *Collier Advertising v. City of New York*, 32 F. Supp. 870 (S.D.N.Y. 1940). See also *Jones v. Township of North Bergen*, 331 F. Supp. 1281 (D.C.N.J. 1971); *Zenith Dredge Company v. Corning*, 231 F. Supp. 584, 588-589 (W.D. Wisc. 1964); *Gray v. Morgan*, 251 F. Supp. 316 (W.D. Wisc. 1966), aff'd 371 F. 2d 172 (7th Cir. 1966), cert. den. 386 U.S. 1033 (1967); *Abernathy v. Carpenter*, 208 F. Supp. 793 (W.D. Mo. 1962), aff'd 373 U.S. 241 (1963); *Carson v. City of Fort Lauderdale*, 293 F. 2d 337 (5th Cir. 1961); *Aronoff v. Franchise Tax Board*, 348 F. 2d 9 (9th Cir. 1965); *City of Houston v. Standard-Triumph Motor Company*, 347 F. 2d 194 (5th Cir. 1965), cert. den. 383 U.S. 974 (1966); *Bussie v. Long*, 254 F. Supp. 797 (E.D. La. 1966); *Carbonneau Industries, Inc. v. City of Grand Rapids*, 198 F. Supp. 627 (W.D. Mich. 1961).*

It is clear that 28 U.S.C. § 1341 is applicable to the present case since the appellee has a plain, speedy and efficient

* Indeed several of these cited cases have held that one of the two remedies (available in New York) would suffice to fall within the confines of the Johnson Act requirement of adequate state remedies, e.g. *Abernathy v. Carpenter*, *supra*.

remedy before the New York State Tax Commission and in the New York State courts.

Since the appellee has a plain, speedy and efficient remedy in the courts of the State of New York and since the appellee has the same remedies available to it as it would have in the Federal courts in the absence of 28 U.S.C. § 1341, the Court below erred in not dismissing the complaint for lack of subject matter jurisdiction and it erred in granting the preliminary injunction to the appellee against the appellants.

It should be noted that the appellee, if there is an adverse decision in the courts of the State of New York, may petition this court to review any decision of the Court of Appeals of the State of New York which appellee feels wrongfully interpreted its constitutional rights with regard to the applicability of the New York State Tax Law to its business.

It is submitted that the Court below should have deferred the interpretation placed on a State Tax statute to the courts of the State of New York. Cf. *United Airlines v. Makin*, 410 U.S. 623, 629 (1973); *Scripto, Inc. v. Carson*, 362 U.S. 207, 210 (1960); *General Trading Co. v. State Tax Commission*, 322 U.S. 335, 337 (1944).

POINT II

The admitted activities of the appellee establish sufficient contacts with the State of New York to make the appellee amenable to suit in courts of the State of New York.

It is submitted that the Court below erred when it held that the appellee's contacts with New York were minimal.

For the sole purpose of expediting proceedings with respect to the appellants' motion to dismiss and the appellee's motion for a preliminary injunction a stipulation was entered into between the attorneys for the appellants and appellee. It was en-

tered into without prejudice to the right of either party to prove different or additional facts at later stages of the action.

In that stipulation, which is attached as Appendix E to this Statement the appellee, whose store is only six miles from the New York border, conceded that it does deliver merchandise into New York State in trucks owned by the appellee and that it sends repairmen into New York. The appellee therein admitted that it advertises on radio and television stations located in New York State and in newspapers published in New York. For the purposes of the stipulation, the appellee would not declare how often it delivers into New York State, or whether it was done on a regular basis. Nor would the appellee disclose a dollar amount of business that it delivers into New York State. Based on this alone, the Court below was in error in prejudging the merits of the case and without further proof find that the appellee's contacts with New York State were minimal.

It is submitted that the fact that the appellee delivers merchandise into New York State in its own trucks; sends repairmen into New York State to repair the merchandise; contracts with radio and television stations located wholly and solely within New York State to carry its advertising; and contracts with newspapers published solely in New York State to carry its advertising on a weekly basis (which advertising makes direct solicitation to New York residents by the fact that the map in the advertising specifically sets forth a map from the Albany, Troy, Cambridge areas of New York to the appellee's place of business in Vermont) (see Exhibit A of Appendix E), the appellee has sufficient contacts with New York State to make it amenable to sue and be sued in the courts of New York State.

It is these continuous and systematic activities of the appellee which give the appellee "presence" within the State of

New York. The appellee, by its activities in the State of New York, is engaging the benefits and protections of the laws of the State of New York. Indeed, if the check of a New York purchaser whose merchandise was delivered into New York State by the appellee was returned for insufficient funds, the appellee could come into the courts of New York State and bring an action to enforce its rights for the monies due and owing. Likewise, if the appellee is going to continue to conduct business in the State of New York, it must submit to the obligations which arise out of or are connected with its activities within the State. *International Shoe Co. v. Washington*, 326 U. S. 310. Such an obligation would be to collect a sales tax on those goods and merchandise which it delivers into the State of New York. It is submitted that the appellee's activities which establish the "presence" within the State of New York subject it to taxation by the State and to sue in the courts of New York to recover the tax if it feels that it should be exempted from the tax (cf., *International Shoe Co. v. Washington*, *supra*).

As Mr. Justice BLACK said in his concurring opinion in *International Shoe Co. v. Washington*:

"Certainly a State, at the very least, has power to tax and sue those dealing with its citizens within its boundaries, as we have held before. *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313."

It is further submitted that the State of New York should not be deprived of the right to afford judicial protection to its citizens on the grounds that it would be more convenient for the appellee to sue or be sued somewhere else.

CONCLUSION

Appellants pray this Court to hear this appeal, that the order and judgment of the three-judge federal court below, which denied appellant's motion to dismiss for lack of jurisdiction should be reversed and the complaint dismissed.

Dated: November 24, 1975

Respectfully submitted,

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APPENDIX A

Opinion of United States District Court for
the District of Vermont

UNITED STATES DISTRICT COURT
For the District of Vermont

GRIFFIN, INC.

v.

JAMES H. TULLY, JR., A. BRUCE MANLEY,
MILTON KOERNER, FRANCIS X. MALONEY
and JOHN WILLEY

Civil Action
File No. 75-104

Before: Oakes, Circuit Judge and Holden and Coffrin,
District Judges

Paul R. Wickes, Esq., Williams, Witten, Carter and Wickes,
Bennington, Vermont for plaintiff.

Thomas P. Zolezzi, Esq., Assistant Attorney General,
Albany, New York, and Peter Joslin, Esq., Theriault and
Joslin, Montpelier, Vermont, for defendants.

COFFRIN, *District Judge.*

This case arises out of an attempt by various officials of the New York State Tax Commission and the Department of Taxation and Finance to require a Vermont corporation to collect New York Sales and Use Tax revenues.

Appendix A.

A. Background

Plaintiff is a Vermont corporation which operates a retail furniture business in Arlington, Vermont, about six miles from the New York-Vermont border. A substantial amount of plaintiff's total sales are made to out-of-state customers, and of this interstate business a substantial portion involves New York residents.

On February 21, 1973, an associate sales tax examiner from the New York Sales Tax Bureau came to Griffin's store for the purpose of auditing plaintiff's books to establish a sales record which would then be the basis of an assessment of the New York sales and use taxes claimed to be owed by Griffin.¹ Plaintiff refused to allow an audit at that time. Matters rested there for more than two years, but on April 23, 1975, defendant Willey, a senior tax examiner, came to conduct an audit at the direction of defendants Tully, Koerner, and Manley who are members of the Tax Commission. Plaintiff again refused to allow an audit and served the complaint in this lawsuit at that time. Defendants subsequently issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due" showing an amount of \$218,085.37. The assessment was based on an estimate rather than any hard data concerning plaintiff's sales records. Subsequently, a second assessment in the amount of \$298,580.59 was issued which superseded the original notice.²

Griffin seeks a declaratory judgment that any assessment, levy, or collection against it would violate the Commerce, Due Process, and Equal Protection clauses of the Constitution. Plaintiff also seeks permanent injunctive relief. After receiving the complaint, defendants filed a motion to dismiss on the ground that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of

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any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Plaintiff subsequently filed a motion for a preliminary injunction on May 30, 1975 and in its memorandum requested that a three-judge court be convened. This court was convened, and the motions to dismiss and for a preliminary injunction were argued on August 1, 1975.

B. Preliminary Matters

It is clear that except for the possible application of section 1341 we would have jurisdiction of this matter. The complaint raises substantial federal questions arising under the Commerce clause and the fourteenth amendment. *Hagans v. Lavine*, 415 U.S. 528 (1974). Plaintiff appears to have stated a claim based directly on the constitution and since there is more than \$10,000 in controversy, we have jurisdiction under 28 U.S.C. § 1331(a). Additionally, 42 U.S.C. § 1983 provides a cause of action for deprivation of constitutional rights under color of state law and we also have jurisdiction under 28 U.S.C. § 1343(3).

A three-judge court is appropriate in this case because the complaint seeks to enjoin state officials from executing a state statute,³ raises substantial constitutional questions,⁴ and alleges a basis for injunctive relief.⁵ See *Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90, 94 (1974). Only a three-judge court has the authority to issue even an interlocutory injunction. 28 U.S.C. § 2281. Although a single judge can entertain a motion to dismiss for lack of subject matter jurisdiction, *Id.* at 100, it is certainly permissible for a three-judge court to do so, *Ammex-Champlain Corp. v. Gallman*, Civil Nos. 72-306, 72-310 (N.D.N.Y. Mar. 13, 1973), *aff'd* 414 U.S. 802 (1973), particularly where consolidation of the motions for hearing may save judicial time and energy.

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C. Motion to Dismiss

We turn first to defendants' motion to dismiss the complaint pursuant to 28 U.S.C. § 1341. Although by its terms section 1341 only forbids a district court to award injunctive relief, the policy considerations which underlie the statutory command preclude an award of declaratory relief as well. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). Clearly, if we lack the ability to grant Griffin the relief it seeks, the case must be dismissed. In that event, it would be unnecessary to reach the merits of plaintiff's motion for a preliminary injunction.

In support of their motion to dismiss defendants argue that there are two available remedies. The first is an administrative appeal to the Tax Commissioners and from there to the New York courts as set forth in section 1138 of the Sales and Use Tax Law.⁶ The other remedy is a declaratory judgment action under section 3001 of the New York Civil Practice Law and Rules (CPLR). We conclude, however, that neither is "plain, speedy and efficient" within the meaning of 28 U.S.C. § 1341.

1. Administrative Appeal

New York Sales and Use Tax Law section 1138 provides that a taxpayer may request an administrative review of the initial assessment in a proceeding before the Tax Commission. The Commission in turn may be reviewed by a CPLR article 78 proceeding. Article 78 review, however, requires that the taxpayer pay the tax or post a bond to stand for taxes, penalties and interest. Sales and Use Tax Law § 1138(a). This prerequisite to judicial review is a major hurdle in Griffin's case since plaintiff has been assessed a tax liability of \$298,580.59, a figure it states is well beyond its ability to pay.

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Defendants point out, however, that this figure is only an estimate which might be substantially reduced upon audit. At this juncture we have no way of knowing what figure an audit would disclose. However, even if an audit would result in a lower assessment, plaintiff objects to having to submit to such a procedure at the hands of a state which it claims has no jurisdiction to conduct an audit in any event.

In order to assert its rights or test its claim, Griffin should not be obliged as a condition precedent to make a choice between paying an assessment or posting a bond in an admittedly arbitrary amount or turning over its books and records to a state whose authority it claims is invalid. *United States Steel Corp. v. Multistate Tax Commission*, 367 F. Supp. 107, 116 (S.D.N.Y. 1973). Whether New York has the authority to require Griffin to collect the New York Sales and Use Tax involves questions of constitutional law, but there is no indication that the Commission is competent to determine constitutional issues.⁷ The Tax Commission redetermines the tax after an initial assessment has been challenged. The redetermination then can be reviewed "for error, illegality or unconstitutionality or any other reason whatsoever . . ." by an article 78 proceeding. Sales and Use Tax Law § 1138(a). Since Griffin does not have to submit to an audit prior to having its constitutional claim heard and since the Tax Commission may be limited to reviewing the computation of tax without competence to resolve constitutional questions, plaintiff and defendants have reached an impasse.

Under the procedures laid down by section 1138 Griffin's first opportunity to air its constitutional claims may well be in an article 78 proceeding, but it is not clear that such judicial review would be available to plaintiff if it steadfastly refuses to submit to audit. Presumably, a hearing before the Tax Commission is a prerequisite to an article 78 proceeding, but

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if plaintiff refuses to submit to Tax Commission authority, then it may jeopardize its article 78 appeal rights. Under these circumstances refusing to allow inspection of books and records might be likened to a failure to exhaust administrative procedures prior to the right to appeal.

In addition to doubts concerning the adequacy of article 78 review, there is one practical consideration of the utmost significance. Even if judicial review is technically available for all issues, Griffin may be unable to present its arguments because of the prepayment or bond requirement. It is fair to assume that the initial assessment of \$298,580.59 would remain unchanged since the Commission would be unable to revise or verify the preliminary estimate without examining Griffin's books and records. Since it is clear that Griffin is unable either to pay the present assessment or to post bond in that amount, the issue is whether the requirement that plaintiff post bond or prepay the tax plus penalties and interest is a condition which renders an article 78 proceeding inadequate for purposes of section 1341. The general rule is that a state may require a taxpayer to litigate from a refund posture even when he questions the validity of the tax itself. *Great Lakes Dredge & Dock Co. v. Huffman*, *supra* at 301. This remedy may be harsh, but there is no indication that it violates due process. *Jackson v. Metropolitan Edison Co.*, 483 F.2d 754, 761 (3d Cir. 1973), *aff'd* 419 U.S. 345 (1974). But in some instances the assessment poses such a heavy burden that to deny equitable relief is to deny judicial review entirely. *Denton v. City of Carrollton*, 235 F.2d 481, 485 (5th Cir. 1956). In such instances a federal court may award equitable relief.

Extraordinary circumstances are present in this case which bring Griffin within the exception to the general rule. New York officials have admitted that the assessment represents an estimate of a liability which is itself contingent on whether the

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tax may be constitutionally applied. Even if it is liable for some tax, plaintiff claims that this estimate is grossly inflated. Plaintiff should not have to prepay or post bond in an entirely arbitrary amount that may bear little relationship to any eventual liability. Second, the bond or prepayment requirement is a prohibitive barrier to an article 78 hearing because Griffin cannot raise the necessary funds by borrowing or otherwise. A bond is not available except at a premium nearly equal to its face value or unless fully supported by collateral. (Affidavits of Robert Dimke, John Lonergan). Finally, an assessment of this magnitude is clearly coercive in its effect. Griffin must carry the assessment on its books as a contingent liability which will severely hamper it in obtaining the credit it needs in the ordinary course of business. (Affidavits of Robert Dimke, Arthur Wickenden). If Griffin cannot carry on its affairs with this assessment outstanding, it must accede to the desires of the New York State officials or face the dire consequences customarily attendant upon a business which cannot meet its credit requirements.

In short, we have no assurance that New York courts would even entertain a suit seeking review of a final determination of tax liability where the taxpayer refused to submit to the Tax Commission's authority. Furthermore, the prepayment or bond requirement in effect denies article 78 review in this instance. Consequently, we are of the opinion that the administrative review procedure does not afford a "plain, speedy or efficient remedy."

2. Declaratory Judgment

Defendants claim that New York's CPLR § 3001 provides for a declaratory judgment remedy. They argue that Griffin could present its constitutional claims without having to submit to an audit, prepay the assessed tax, or post bond in that

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amount. There are several difficulties with this remedy, however, which lead us to conclude that it does not satisfy section 1341.

Section 1140 of the Sales and Use Tax Law provides:

§ 1140. REMEDIES EXCLUSIVE.—The remedies provided by sections eleven hundred thirty-eight and eleven hundred thirty-nine shall be *exclusive remedies* available to any person for the review of tax liability imposed by this article; and *no determination or proposed determination* of tax or determination on any application for refund shall be *enjoined or reviewed by an action for declaratory judgment*, an action for money had and received, *or by any action or proceeding other than a proceeding under article seventy-eight of the civil practice law and rules.* (Emphasis added).

While the language of section 1140 apparently forecloses any declaratory judgment remedy, defendants claim that the case law has substantially diffused the effect of this forceful statement. New York courts have held that a declaratory judgment action may be maintained despite statutory language making a review proceeding exclusive if the taxpayer challenges the tax as unconstitutional or inapplicable to his case. *Richfield Oil Corp. v. City of Syracuse*, 287 N.Y. 234, 239 (1942). The general rule stated in *Richfield* has been applied specifically to section 1140 by a lower appellate court. *Hospital Television Systems, Inc. v. New York State Tax Commission*, 41 A.D.2d 576 (3d Dept. 1973). In addition, some federal cases have assumed that a declaratory judgment remedy was available in dismissing taxpayer actions for injunctive relief on the grounds that an adequate state remedy existed. *Hickmann v. Wujick*, 488 F.2d 875, 876 (2d Cir. 1973); *Ammex-Champlain Corp. v. Gallman*, *supra*. Nevertheless there appears to be a contradiction between the plain

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language of section 1140 and the few cases we have found which cloaks this issue in some uncertainty.

When there is uncertainty with regard to the adequacy of a state remedy, a federal court may retain jurisdiction and give appropriate relief. *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105-106 (1944). Clearly, if a remedy is entirely unavailable, it would be inadequate. Since it is not certain that a declaratory judgment is available in this instance, we cannot be sure that the remedy in question is adequate.

But even if it were certain that section 3001 is available, a declaratory remedy standing alone may still be inadequate. *Spector Motor Co. v. McLaughlin*, *supra*.⁹ In *Ammex* the court ruled that the apparent inability of New York courts to give injunctive relief was not crucial, but there are important distinctions between *Ammex* and this case which lead us to the opposite conclusion. *Ammex-Champlain* sold cigarettes and liquor to travelers going from the United States to Canada. The corporation maintained sales offices and warehouses at various points on the New York side of the border. The warehouses were located so that one could only go into Canada after picking up one's merchandise. This unique physical arrangement gave rise to a claim that the sales were exempt from state tax under both the Commerce and Export-Import clauses of the Constitution. The important point is that the corporation was clearly present in New York State, and therefore it could expect to litigate in New York courts. But Griffin's contacts with New York are minimal.¹⁰ For this reason it seems unfair to make Griffin litigate in an unfamiliar forum.¹¹ Plaintiff's unfamiliarity with New York courts is a counterweight to the reasons for requiring a taxpayer to raise his objections to an assessment in the courts of the taxing state. This counterweight admonishes us to exact a somewhat higher degree of certainty regarding the adequacy

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of New York's declaratory judgment remedy than was appropriate in *Ammex*. But though a higher standard of certainty should obtain, we do not have the same basis for confidence regarding the availability of preliminary relief should the need arise. In *Ammex* the parties agreed that there would be no collection attempt pending a New York court's decision on the merits, but there is no such stipulation in this case. Defendants argue that preliminary injunctive relief would be available in New York courts, but we have reservations on this score as seemingly did the court in *Ammex*.

Accordingly, we hold that in the circumstances of this case New York's declaratory judgment remedy is neither so certainly available nor so clearly adequate as to preclude our jurisdiction to issue injunctive relief. Since neither of the remedies available to plaintiff in New York are "plain, speedy and efficient," we have the power to grant injunctive relief and this lawsuit need not be dismissed.

D. *Motion for Preliminary Injunction*

We turn now to Griffin's motion for a preliminary injunction. In deciding whether to grant or deny preliminary relief the two primary considerations are plaintiff's chance of eventual success on the merits and the potential for irreparable injury if interlocutory relief is not granted. It is also important to balance the potential hardship to both plaintiff and defendants and to ascertain where the public interest lies. *New York Pathological and X-Ray Laboratories, Inc. v. Immigration and Naturalization Service*, Doc. No. 74-2630, at 5668-69 (2d Cir. Aug. 18, 1975).

1. *Irreparable Injury*

Griffin may well suffer irreparable injury from New York collection attempts once the assessment becomes final. Grif-

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fin is vulnerable because it makes deliveries to New York purchasers in its own trucks. If plaintiff continues this practice the trucks and merchandise could be seized.¹¹ Seizures would disrupt business, frustrate customers, and result in loss of sales. Griffin's alternative would be to completely change its present mode of operation. New York may also attempt collection in Vermont by lawsuit and liens on property. In short, vigorous collection attempts could cripple and perhaps destroy Griffin's business.

Another potential injury stems from the fact that Griffin will be unable to contest the amount of its liability should we ultimately decide that New York does have the authority to require plaintiff to collect the tax. Griffin claims the current assessment is excessive, but section 1138 requires that anyone wishing to challenge an assessment must request a hearing before the Tax Commission within 90 days of notice. The assessment was issued on August 8, 1975. Unless the 90 day period is tolled, the time for requesting a hearing almost assuredly will have passed before we reach a decision on the merits.

Finally, the assessment will appear as a black mark on Griffin's balance sheet. Griffin must carry the assessment as a contingent liability which will substantially impair plaintiff's ability to secure the credit it needs in the ordinary course of business.

Griffin clearly needs preliminary relief to prevent it from suffering irreparable injury, and defendants will not be harmed by some delay. Although the court takes judicial notice of the fact that some state and municipal governments are currently hard-pressed to meet their financial obligations, collection of this assessment will not make the difference between financial stability and ruin.¹² On balance, Griffin deserves protection if it can show a likelihood of success on the merits.

2. *Probability of Success on The Merits*

New York seeks to hold a Vermont corporation responsible for the collection of New York's sales and use tax on furniture sales to New York residents. In *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954), Justice Jackson discussed a similar taxing scheme set up by the State of Maryland. The economic effect of holding Griffin liable for collection of the sales and use tax is to protect New York businesses by putting out-of-state retailers on the same footing as local merchants for sales to New York residents. But as distinguished from a direct tax on a sale, liability here arises only on the importation of the furniture into New York, an event which occurs after title has passed and of which Griffin may have no knowledge. Since the sale in Vermont establishes no link between Griffin and New York, the issue is whether Griffin's acts or course of dealing has subjected it to New York's taxing authority or has afforded New York jurisdiction to saddle Griffin with responsibility for tax collection. Due process requires some minimum link between a state and the person, property, or transaction it seeks to tax.

Miller Bros. involved a situation almost identical to the one before us now. A Delaware furniture corporation operating in Wilmington made sales to Maryland residents. Customers sometimes took their purchases with them, but usually Miller Bros. delivered the items in its own trucks or by common carrier. The only difference of any colorable significance between Griffin's operation and those of the Delaware firm is that Miller Bros. advertised only in Wilmington newspapers, radio, and television while Griffin uses media based in the Albany-Schenectady-Troy region of New York. This difference is not important, however, since residents of Bennington County, Vermont, Griffin's primary marketing area, rely on New York media. Miller Bros. advertising reached

Maryland and Delaware residents alike just as Griffin's reaches residents of New York and Vermont. The site of a broadcasting tower or a printing press should not be controlling. Neither Miller Bros. nor Griffin made a special appeal to out-of-state residents.

Because of the similarities, the Supreme Court's decision in *Miller Bros.* holding that Maryland had exceeded its authority is extremely persuasive precedent. Other cases which uphold a state's taxing power are distinguishable on their facts. In *General Trading Co. v. Tax Commission*, 322 U.S. 335 (1944), a corporation based in Minnesota sent traveling salesmen into Iowa to solicit orders for merchandise which the home office then sent to Iowa by common carrier or mail. Similarly, in *Scripto v. Carson*, 362 U.S. 207 (1960), a division of Scripto based in Atlanta solicited orders in Florida by using Florida residents as jobbers. Scripto assigned jobbers a specific territory and paid them on a commission basis. In *Miller Bros.* Justice Jackson distinguished *General Trading* on the ground that the subject corporation sent its sales representatives into the taxing state, a distinction we are inclined to follow in the case at hand.

Since Griffin has demonstrated a likelihood of success on the merits and on balance a need for interlocutory relief, a preliminary injunction will issue.

Accordingly, defendants' motion to dismiss is denied. Plaintiff's motion for a preliminary injunction is hereby granted. Defendants are temporarily enjoined from attempting to collect the tax assessed against plaintiff. Defendants are ordered to revoke the notice of assessment dated August 8, 1975 and hold further collection proceedings in

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abeyance pending a determination of this matter on the merits.

JAMES L. OAKES,
United States Circuit Judge.

JAMES S. HOLDEN,
United States District Judge.

ALBERT W. COFFRIN,
United States District Judge.

October 20th, 1975.

FOOTNOTES

¹ Defendants maintain that by reason of plaintiff's activities in New York State the plaintiff is a vendor as defined by section 1101(b)(8)(i) of the Tax Law. As such defendants claim Griffin is required to register, collect and remit sales taxes on sales of tangible personal property delivered in New York State, is personally liable for sales taxes not collected and remitted and must permit examination of its records. The duties of a vendor are found in sections 1105(a), 1105(c)(3), 1131(1), 1132(a), 1133(a), 1134 and 1135 of the Tax Law of the State of New York. For purposes of this opinion and order it is only necessary to note that defendants seek to impose collection of the New York Sales and Use Tax on plaintiff, a Vermont corporation, and plaintiff seeks to resist that effort. Accordingly, it is unnecessary to set forth the appropriate provisions of the statute in detail.

² The original notice was issued on May 14, 1975. Under section 1138(a) of the Sales and Use Tax Law, a party has 90 days to apply to the Tax Commission for a hearing on the assessment. This period would have run out on August 11, 1975, however, the Commission cancelled the May 14, 1975 notice and issued a superseding notice on August 8, 1975. The new notice shows an assessment of \$298,580.59. Thus plaintiff has not as yet lost his right to appeal to the Tax Commission, but the new assessment is larger by approximately \$80,000.00.

³ *Moody v. Flowers*, 387 U.S. 97 (1967).

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⁴ *Gousby v. Osser*, 409 U.S. 512 (1973).

⁵ *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962).

⁶ § 1138. Determination of tax

(a) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors. Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same. After such hearing the tax commission shall give notice of its determination to the person against whom the tax is assessed. The determination of the tax commission shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless the amount of any tax sought to be reviewed, with penalties and interest thereof, if any, shall be first deposited with the tax commission and there shall be filed with the tax commission an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding, or at the option of the applicant such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application.

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(b) If the tax commission believes that the collection of any tax will be jeopardized by delay it may determine the amount of such tax and assess the same, together with all interest and penalties provided by law, against any person liable therefor prior to the filing of his return and prior to the date when his return is required to be filed. The amount so determined shall become due and payable to the tax commission by the person against whom such a jeopardy assessment is made, as soon as notice thereof is given to him personally or by registered or certified mail. The provisions of subdivision (a) of this section shall apply to any such determination except to the extent that they may be inconsistent with the provisions of this subdivision. The tax commission may abate any jeopardy assessment if it finds that jeopardy does not exist. The collection of any jeopardy assessment may be stayed by filing with the tax commission a bond issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance as to solvency and responsibility, conditioned upon payment of the amount assessed and interest thereon, or any lesser amount to which such assessment may be reduced by the tax commission or by a proceeding under article seventy-eight of the civil practice law and rules as provided in subdivision (a), such payment to be made when the assessment or any such reduction thereof shall have become final and not subject to further review. If such a bond is filed and thereafter a proceeding under article seventy-eight is commenced as provided in subdivision (a), deposit of the taxes, penalties and interest assessed shall not be required as a condition precedent to the commencement of such proceeding. Where a jeopardy assessment is made, any property seized for the collection of the tax shall not be sold (1) until expiration of the time to apply for a hearing as provided in subdivision (a) of this section, and (2) if such application is timely filed, until the expiration of four months after the tax commission has given notice of its determination to the person against whom the assessment is made; provided, however, such property may be sold at any time if such person has failed to attend a hearing of which he has been duly notified, or if he consents to the sale, or if the tax commission determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or if the property is perishable.

(c) A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto.

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⁷ Defendant argues that the Commission is competent to decide questions as to its own authority, but they have not cited any authority for this proposition.

⁸ Declaratory relief was available in *Spector*; nevertheless the Supreme Court held that a federal court should retain jurisdiction of the suit in order to give appropriate equitable relief. A complicating factor in *Spector*, however, was the fact that there were undecided questions of state tax law which potentially could have disposed of the case in plaintiff's favor without reaching the constitutional claims. Since there was a declaratory judgment remedy where those questions could be decided, the Supreme Court instructed the district court to abstain while the parties litigated these matters in state court. Abstention would be improper in this case, however, because there is no indication that there are undecided questions under New York's tax law, and furthermore, the declaratory judgment remedy is not completely certain. *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629 (1946).

⁹ Plaintiff owns no realty and has no place of business in New York. It does not solicit business in New York through any sort of representative. Plaintiff does advertise in the media which serve the Albany-Schenectady-Troy region. This is the only metropolitan area within plaintiff's marketing area. Vermont based media do not cover all of plaintiff's Vermont marketing area so Griffin relies in part on New York newspapers, television channels, and radio stations whose coverage includes southwestern Vermont. In addition to advertising in New York media, Griffin also delivers merchandise to New York buyers in plaintiff's own trucks or occasionally by common carrier. Upon delivery, plaintiff's employees may assemble pieces of furniture. Occasionally employees return to "touch up" or repair minor defects. No charge is made for such services.

¹⁰ Plaintiff, a Vermont corporation, has never been and is not now registered or qualified or authorized to do business in New York State. We need not decide whether, despite this fact, it has sufficient contacts with the State of New York to subject its person to the jurisdictional power of the New York courts. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). But it is clear that in order to avail itself of either the section 1138—article 78 proceeding or section 3001 declaratory judgment remedy Griffin would have to submit itself to the jurisdiction of the New York courts and thereby deprive itself of any possibility of asserting a claim that it was not subject to such jurisdiction. It should not be forced to litigate in New York at the risk of losing the opportunity to raise this issue. A remedy can hardly be said to be "plain, speedy and efficient" if the only way a party can take advantage thereof is to abandon a valid right which it possesses.

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¹¹ Exhibit D(2) to plaintiff's motion for a preliminary injunction is a news release forwarded to plaintiff by defendant Maloney. The news release concerns roadblocks which were set at three bridges leading from New Jersey to Staten Island to discover shipments of household appliances, furniture and other merchandise trucked into New York from New Jersey by merchants who had not collected the New York sales tax. Although the news release does not indicate that any seizures occurred, it would appear that a roadblock could lead to a seizure.

¹² In fact, upon oral argument counsel for the defendants indicated that the assessment against Griffin was brought about largely, if not entirely, as the result of New York competitors' complaints to the Tax Department.

APPENDIX B**Notice of Appeal by State of New York****UNITED STATES DISTRICT COURT**

For the District of Vermont
Civil Action File No. 75-104

GRIFFIN, INC.,

Plaintiff,

against

JAMES H. TULLY, JR., A. BRUCE MANLEY,
MILTON KOERNER, FRANCIS X. MALONEY
and JOHN WILLEY,

Defendants.

Sirs:

PLEASE TAKE NOTICE that the defendants hereby appeal to the United States Supreme Court from the judgment and order of this Court entered October 20, 1975 in its entirety which denied defendants' motion to dismiss the action for lack of subject matter jurisdiction; and which temporarily enjoined the defendants from attempting to collect the tax assessed against the plaintiff and ordered the defendants to revoke the notice of assessment dated August 8, 1975, and

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hold further collection proceedings in abeyance pending a determination of the matter on the merits.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: Albany, New York, November 7, 1975.

Yours, etc.,

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
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By THOMAS P. ZOLEZZI,
Thomas P. Zolezzi,
Assistant Attorney General.

To:

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United States District Court,
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Bennington, Vermont 05201,
Attorneys for Plaintiff.

Theriahult and Joslin, Esqs.,
87 Main Street,
Montpelier, Vermont 05602,
Vermont Local Counsel for Defendants.

APPENDIX C

New York State Tax Law, sections 1101(b)(8)(i), 1105(a),
1105(c)(3), 1131(1), 1132(a), 1133(a), 1134 and 1135.

APPENDIX A

"§ 1101. Definitions

* * *

(b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(8) Vendor. (i) The term 'vendor' includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article; and

(D) Any other person making sales to persons within the state of tangible personal property or services, the use of which is taxed by this article, who may be

Appendix C.

authorized by the tax commission to collect such tax by part IV of this article;

(E) The state of New York, any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions when such entity sells services or property of a kind ordinarily sold by private persons."

"§ 1105. Imposition of sales tax

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail store of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property, or maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except such services rendered by an individual who is engaged directly by a private home owner or lessee in or about his residence and who is not in a regular trade or business offering his services to the public, and except any receipts from laundering, dry-cleaning, tailoring, weaving, pressing, shoe repairing and shoe shining, and except for installing property which, when installed, will constitute an ad-

Appendix C.

dition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law, and except such services rendered on or after August first, nineteen hundred sixty-five with respect to commercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs (other than with respect to articles purchased for the original equipping of a new ship); provided, however, that nothing contained in this paragraph shall be construed to exclude from tax under this paragraph or under subdivision (b) of this section any charge, made by a person furnishing service subject to tax under subdivision (b) of this section, for installing property at the premises of a purchaser of such a taxable service for use in connection with such service."

"§ 1131. Definitions

When used in this part IV,

(1) 'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

"§ 1132. Collection of tax from customer:
proof required for registration
of motor vehicles

(a) Every person required to collect the tax shall collect the tax from the customer when collecting the price,

Appendix C.

amusement charge or rent to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state."

"§ 1133. Liability for the tax

(a) Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. Any such person shall have the same right in respect to collecting the tax from his customer or in respect to non-payment of the tax by the customer as if the tax were a part of the purchase price of the property or service, amusement charge or rent, as the case may be, and payable at the same time; provided, however, that the tax commission shall be joined as a party in any action or proceeding brought to collect the tax."

"§ 1134. Registration

On or before August first, nineteen hundred sixty-five, or in the case of persons commencing business or opening new places of business after such date, within three days after such commencement or opening, every person required to collect any tax imposed by this article and every person purchasing tangible personal property for resale shall file with the tax commission a certificate of registration in a form prescribed by it. In addition to those persons required to register pursuant to the preceding sentence, on or before June first, nineteen hundred sixty-six, or in the case of persons commencing business or opening new places of business after such

Appendix C.

date, within three days after such commencement or opening, every person selling tangible personal property for resale shall also file such a certificate. The tax commission shall within five days after such registration issue, without charge, to each registrant a certificate of authority empowering him to collect the tax and a duplicate thereof for each additional place of business of such registrant. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be prominently displayed in the places of business of the registrant. A registrant who has no regular place of doing business shall attach such certificate to his cart, stand, truck or other merchandising device. Such certificates shall be nonassignable and nontransferable and shall be surrendered to the tax commission immediately upon the registrant's ceasing to do business at the place named. However, a person who is presently registered pursuant to the provisions of title G, M, N or V of chapter forty-six of the administrative code of the city of New York or under any retail sales, compensating use, consumer's utility, admissions and dues or hotel room occupancy tax imposed by a city, county or school district pursuant to the provisions of chapter two hundred seventy-eight of the laws of nineteen hundred forty-seven, as amended, need not register again under this article unless the tax commission shall require him to do so. A person other than one described in clauses (A), (B) and (C) of paragraph (8), of subdivision (b), of section eleven hundred one, but who makes sales to persons within the state of tangible personal property or services, the use of which is subject to tax under this article, may if he so elects file a certificate of registration with the tax commission which may, in its discretion and subject to such conditions as it may impose, issue to him a certificate of authority to collect the compensating use tax imposed by this article."

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"§ 1135. Records to be kept

Every person required to collect tax shall keep records of every sale or amusement charge or occupancy and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the tax commission may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately. Such records shall be available for inspection and examination at any time upon demand by the tax commission or its duly authorized agent or employee and shall be preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer."

"§ 1138. Determination of tax

(a) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors. Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same. After such hearing the tax commission shall give notice of its determination to

Appendix C.

the person against whom the tax is assessed. The determination of the tax commission shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless the amount of any tax sought to be reviewed, with penalties and interest thereon, if any, shall be first deposited with the tax commission and there shall be filed with the tax commission and undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding, or at the option of the applicant such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application.

(b) If the tax commission believes that the collection of any tax will be jeopardized by delay it may determine the amount of such tax and assess the same, together with all interest and penalties provided by law, against any person liable therefor prior to the filing of his return and prior to the date when his return is required to be filed. The amount so determined shall become due and payable to the tax commission by the person against whom such a jeopardy

Appendix C.

assessment is made, as soon as notice thereof is given to him personally or by registered or certified mail. The provisions of subdivision (a) of this section shall apply to any such determination except to the extent that they may be inconsistent with the provisions of this subdivision. The tax commission may abate any jeopardy assessment if it finds that jeopardy does not exist. The collection of any jeopardy assessment may be stayed by filing with the tax commission a bond issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance as to solvency and responsibility, conditioned upon payment of the amount assessed and interest thereon, or any lesser amount to which such assessment may be reduced by the tax commission or by a proceeding under article seventy-eight of the civil practice law and rules as provided in subdivision (a), such payment to be made when the assessment or any such reduction thereof shall have become final and not subject to further review. If such a bond is filed and thereafter a proceeding under article seventy-eight is commenced as provided in subdivision (a), deposit of the taxes, penalties and interest assessed shall not be required as a condition precedent to the commencement of such proceeding. Where a jeopardy assessment is made, any property seized for the collection of the tax shall not be sold (1) until expiration of the time to apply for a hearing as provided in subdivision (a) of this section, and (2) if such application is timely filed, until the expiration of four months after the tax commission has given notice of its determination to the person against whom the assessment is made; provided, however, such property may be sold at any time if such person has failed to attend a hearing of which he has been duly notified, or if he consents to the sale, or if the tax commission determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or if the property is perishable.

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(c) A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

APPENDIX D

Decision of United States District Court
for the Northern District of
New York

UNITED STATES DISTRICT COURT

Northern District of New York

 AMMEX-CHAMPLAIN CORP.,
Plaintiff,

-against-

NORMAN GALLMAN, MILTON KOERNER and A.
BRUCE MANLEY as President and Members of the State
Tax Commission of the State of New York,
Defendants.

 72 Civ. 306

AMMEX WAREHOUSE COMPANY, INC.,

Plaintiff,

-against-

NORMAN GALLMAN, MILTON KOERNER and A.
BRUCE MANLEY as President and Members of the State
Tax Commission of the State of New York,
Defendants.

 72 Civ. 310

KAUFMAN, *Circuit Judge:*

Ammex Warehouse Co. and Ammex-Champlain Corp. are
engaged in the business of selling cigarettes and liquor at

Appendix D.

eight locations¹ to persons entering Canada from New York. Although minor variations occur at each facility, the general scheme of operations may be described as follows. At each location, Ammex has two buildings. One building is a sales office, where sample merchandise is displayed. Persons who are about to cross the border into Canada enter this building and choose and pay for their purchases. No merchandise is delivered at this point. Instead, the customer receives an invoice recording his purchases.² He then proceeds to a warehouse, which is located immediately adjacent to the border, where he presents his invoice to an employee of Ammex, who places the merchandise in the customer's vehicle under the supervision of a United States Bureau of Customs Inspector. The warehouse facilities are designed in such a way that a customer can proceed only across the border after he receives his purchases and nowhere else.³ A Customs Inspector observes each customer cross the border and certifies on a copy of the invoice that the merchandise has been exported.

Ammex's operations are governed by the Tariff Act of 1930, 19 U.S.C. §1311 *et seq.*, and the alcoholic beverage and tobacco products provisions of the Internal Revenue Code of 1954, 26 U.S.C. §5001 *et seq.* Pursuant to these statutes, alcoholic beverages and tobacco products which are exported from the United States are exempted from Federal excise taxes and duties. The Bureau of Customs closely supervises Ammex's facilities to insure that all tax-free merchandise actually is exported and that none enters the domestic market. Bureau of Customs personnel are present at Ammex's facilities and, in addition to observing the delivery and export of all merchandise, maintain detailed inventory controls.

Appendix D.

The present controversy began in 1971 when, for the first time since Ammex commenced operations in 1963, the New York State Tax Commission, whose three members are the defendants in these cases, assessed state alcoholic beverage, tobacco, and sales taxes—totalling approximately in excess of \$1,829,704.58 against Ammex. See Arts. 18, 20, and 28, N.Y. Tax Law (McKinney's 1966). Ammex, claiming that its operations were exempt from state taxation under both the Commerce Clause⁴ and the Import-Export Clause⁵ of the United States Constitution, brought these actions in federal court seeking a declaratory judgment that application of the New York taxing statutes to Ammex's export operations was unconstitutional and an injunction preventing any further assessments or collection of the tax. Since the complaints sought a "permanent injunction restraining the enforcement, operation or execution of [a] State statute by restraining the action of [an] officer of such State," a three-judge district court was convened pursuant to 28 U.S.C. §2281.

Although Ammex's challenge to the New York taxes, at first blush, appears meritorious, *see Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (departing airline passengers ordered liquor at a United States airport and received merchandise upon debarking in a foreign country; held not subject to state licensing requirements); *Ammex Warehouse Company of San Ysidro v. Dep't of Alcoholic Beverage Control for the State of California*, 224 F. Supp. 546 (S.D. Cal. 1963) (three-judge district court) (operation at California-Mexico border similar to Ammex's New York operations held not subject to state licensing requirements), *aff'd*, 378 U.S. 124 (1964) (*per curiam*, citing to *Hostetter, supra*), we are of the view that at this juncture we are without jurisdiction to consider this claim. Congress has provided that "The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state" 28 U.S.C. §1341. We believe such a

Appendix D.

remedy is available in the New York courts. N.Y. Civil Practice Law and Rules §3001 (McKinney's 1970) provides that the state supreme court may issue declaratory judgments. There is ample authority that a declaratory judgment action may be employed to challenge imposition of a tax. *See, e.g., Richfield Oil Corp. v. City of Syracuse*, 287 N.Y. 234 (1942); *Hudson Transit Lines, Inc. v. Bragalini*, 172 N.Y.S. 2d 423 (Sup. Ct. 1958). Accordingly, Ammex may present its arguments in the state supreme court and seek a declaratory judgment from that court that application of these taxes to Ammex's export operations is unconstitutional.⁶ The parties could seek ultimate review in the United States Supreme Court 28 U.S.C. §1257. We find unpersuasive Ammex's contention that the apparent inability of the state supreme court to issue an injunctive order barring collection by the State Tax Commission pending a final decision renders a declaratory judgment action inadequate under 28 U.S.C. §1341. We doubt that the State Tax Commission, after stressing to this court the adequacy of a declaratory judgment action, would attempt to collect any assessed taxes during the pendency of such an action brought by Ammex. Moreover, the State has stipulated before us that no attempt to collect any such taxes will be made until after the final resolution of plaintiffs' declaratory judgment action in the state courts. Accordingly, the present absence of any indication that available state remedies are inadequate requires us to dismiss Ammex's actions for lack of jurisdiction. Of course, Ammex is free to return to federal court if a declaratory judgment action proves inadequate.

So ordered.

IRVING R. KAUFMAN,
U.S.C.J.
JAMES T. FOLEY,
U.S.D.J.
EDWARD PORT,
U.S.D.J.

Dated: Albany, New York, March 15, 1973.

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FOOTNOTES.

¹ Ammex Warehouse Co. maintains sales facilities at Buffalo, Niagara Falls, Wellesley Island, Messina, Ogdensburg, Trout River, and Rouses Point. Ammex-Champlain Corp. operates at a single location in Champlain. For convenience, both companies will be referred to collectively as "Ammex."

² Prominently printed upon the invoice are the words "Articles are sold for EXPORT ONLY. Purchases brought back to the United States must be declared and are subject to duty and/or tax." A sign with identical language is posted in the office.

³ For example, at Champlain, the warehouse area is enclosed within a fence. After leaving the warehouse delivery platform, a customer drives on a one-way road which leads to a gate located at the border. Customers are not permitted to turn around on the road; once merchandise is received, they must leave the warehouse area through the gate and enter Canada.

⁴ Art. I, §8, Cl. 3: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states . . ."

⁵ Art. I, §10, Cl. 2: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ."

⁶ Thus, we need not decide whether an alternate state remedy—judicial review under Art. 78, N.Y. Civil Practice Law and Rules (McKinney's 1970), of an administrative proceeding challenging the tax before the State Tax Commission—is "plain, speedy and efficient." A taxpayer must either pay the assessment or post a bond of equivalent value in order to obtain such review. Moreover, no interest would be paid on cigarette and alcoholic beverage taxes subsequently held to have been assessed illegally.

APPENDIX E

Stipulation Between Attorneys for Parties

UNITED STATES DISTRICT COURT

For the District of Vermont

 GRIFFIN, INC.,

Plaintiff,

v.

JAMES H. TULLY, JR., *et al.*,

Defendants.

 Civil Action, File No. 75-104

COME NOW the parties hereto, and, by their undersigned attorneys, stipulate as to the following facts. The parties agree that this stipulation is entered into for the purpose of expediting proceedings with respect to defendants' motion to dismiss and plaintiff's motion for a preliminary injunction, and this stipulation is entered into without prejudice to the right of either party to prove different or additional facts at later stages of this proceeding.

I. Background Facts

1. Plaintiff was incorporated in Vermont on or about March 25, 1946, under the name Kane-Griffin, Inc. The name of the corporation was changed to Griffin, Inc. on February 4, 1953. The corporation has carried on a retail furniture business in Arlington, Vermont since its formation, and has had a store at its present location on the western side of U.S. Route 7 in Arlington, Vermont since approximately 1947.

Appendix E.

2. Plaintiff store is located approximately 25 miles from the Massachusetts-Vermont border, and approximately 6 miles from the New York-Vermont border.

3. A substantial portion of plaintiff's sales are made to persons who are not residents of Vermont. A substantial portion of such interstate sales are to residents of New York.

4. Articles purchased from plaintiff are sometimes carried away from the store by purchasers, and especially with respect to purchases of furniture, are sometimes delivered to the purchaser in trucks owned by plaintiff.

5. Defendants Tully, Manley and Koerner are Commissioners of the New York State Tax Commission. Defendant Maloney is the Director of the Sales Tax Bureau of the New York Department of Taxation and Finance. Defendant Willey is the Senior Sales Tax Examiner of the Sales Tax Bureau of the New York State Department of Taxation and Finance.

6. On or about February 21, 1973, George Bradford, an associate sales tax examiner of the New York State Sales Tax Bureau came to plaintiff's place of business for the purpose of conducting an audit of the records of plaintiff, and advised officers of plaintiff that the purpose of such audit was the establishment of sales records upon which to base an assessment of New York State and local sales and use taxes owed by plaintiff. Plaintiff refused to permit Mr. Bradford to conduct an audit.

7. On April 23, 1975, defendant Willey came to plaintiff's place of business for the purpose of conducting an audit of plaintiff's records in order to determine plaintiff's liability under New York's Sales and Use Tax Law. Plaintiff refused to permit such an audit.

Appendix E.

8. The action of defendant Willey in seeking to audit the records of plaintiff, and of defendant Maloney in seeking to assess New York state and local sales and use taxes against plaintiff, was taken at the instance and on the instructions of defendants Tully, Koerner and Manley, who, as members of the Tax Commission of the State of New York are the employers and superiors of defendants Willey and Maloney.

9. On May 14, 1975, defendants caused to be issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due", showing an amount due of \$218,085.37.

10. The Notice referred to in Paragraph 9 hereof is based on an estimate.

11. The issuance of the aforesaid Notice serves to commence collection procedures and appeal times, under the New York State Sales and Use Tax Law. Under New York law, Plaintiff will lose whatever rights it may have to appeal this notice to the New York State Tax Commission on or about August 11, 1975.

*II. Contacts of Plaintiff With New York State**A. In General*

1. Plaintiff has never been and is not now registered, qualified or authorized to do business in New York State.

2. Plaintiff has never owned any real property in New York State.

3. Plaintiff does not solicit sales in New York State through salesmen, agents, or other representatives.

4. Plaintiff has no office, warehouse, showroom, or other facility of any kind in New York State.

*Appendix E.**B. Deliveries*

1. Furniture purchased by residents of New York State from plaintiff is typically delivered to the purchaser in trucks owned by plaintiff, or occasionally by common carrier.

2. Such deliveries are made by employees of plaintiff. Furniture sometimes requires assembling or "setting-up", such as the attachment of legs to a table. This generally makes it impractical to use common carriers to deliver furniture.

C. Repairs

1. Employees of plaintiff enter New York State infrequently for the purpose of repairing furniture purchased from plaintiff.

2. A typical such repair would be the "touching-up" of scratches on wooden furniture.

3. No charge is made for such repair services.

D. Advertising

1. Plaintiff advertises through advertising media located in the Albany-Schenectady-Troy area of New York, and in Vermont.

2. Such advertising includes primarily radio advertising, newspaper advertising, occasional television advertising, and one roadside sign located near the Vermont border on New York Route 7.

3. The Albany-Schenectady-Troy area of New York is the only substantial metropolitan area located within plaintiff's primary marketing area.

4. WBTN, of Bennington, Vermont, is the only commercial radio station located in Bennington, Vermont. WBTN

Appendix E.

cannot be heard using ordinary radio receivers in large parts of Bennington County. Plaintiff advertises on WBTN.

5. WCAX, located in Burlington, Vermont, is the only commercial television station located in the state of Vermont.

6. WCAX-TV can, with few exceptions, be received in Bennington County only by cable. Cable service carrying WCAX-TV has only recently become available in Bennington, Vermont. Plaintiff does not advertise on WCAX-TV.

7. Bennington County, Vermont relies primarily on the Albany-Schenectady-Troy area of New York for radio and television broadcast media. For example, the three primary television stations which are received without cable in Bennington County, Vermont are WTEN (CBS), WRGB (NBC), and WAST (ABC), all located in the Albany-Schenectady-Troy area.

8. Plaintiff advertises on certain radio stations (and, in the past, has advertised on certain television stations) whose facilities are located entirely within New York State, and whose broadcast area includes southwestern Vermont.

9. Plaintiff advertises in the weekly joint television listings section of The Times-Union and The Knickerbocker News/Union-Star. These Newspapers are published in Albany, New York and circulated primarily in the Albany-Schenectady-Troy area of New York and in southwestern Vermont. A copy of the advertisement published in the listings for June 7-14, 1975 is attached hereto as Exhibit "A."

Appendix E.

E. Credit and Collection

1. Plaintiff sells furniture exclusively for cash, check, or bank credit cards, and does not itself extend credit to customers.

Dated this 7th day of July, 1975.

GRIFFIN, INC.,

By Williams, Witten, Carter
& Wickes,

Its Attorneys,

By R. Paul Wickes,

A member of the firm.

JAMES H. TULLEY, JR., *ET AL.*,

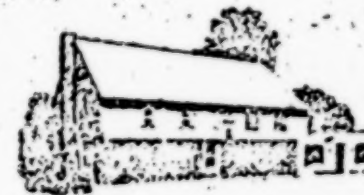
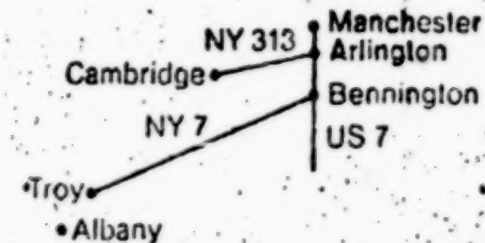
By Louis J. Lefkowitz, Attorney General
of the State of New York,

Attorney for Defendants,

By Thomas P. Zolezzi,

Assistant Attorney General.

Exhibit "A"



GRIFFIN'S

Where good furniture costs less

ARLINGTON, VERMONT 05250

Telephone (802) 375-2800, 375-2310

The prices at GRIFFIN'S are so much lower than normal retail markup prices that we never have had a "sale" — and because of this low pricing policy of top quality furniture, we never will.

You are cordially invited to visit us on any day of the week including Sundays, until 5:30 p.m.

BEST COPY AVAILABLE

APPENDIX

(G-38)

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-831

GRIFFIN, INC.,

Appellee,

— *against* —

JAMES H. TULLY, JR., A. BRUCE MANLEY, MILTON
KOERNER, FRANCIS X. MALONEY, and JOHN
WILLEY,

Appellants.

*Appeal from the United States District Court
For the District of Vermont*

Jurisdictional Statements filed on December 11, 1975.
Probable Jurisdiction noted February 23, 1976.

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COMPLAINT.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GRIFFIN, INC.,

Plaintiff,

v.

JAMES H. TULLY, JR., A. BRUCE MANLEY, MILTON
KOERNER, FRANCIS X. MALONEY, and JOHN
WILLEY,

Defendants.

Civil Action File No. 75-104

PARTIES

1. Plaintiff Griffin, Inc., is a corporation organized under the laws of the State of Vermont, with its only place of business on U.S. Route 7 in Arlington, Vermont. Plaintiff is a retailer of home furnishings, souvenirs and gifts.

2. Defendants Tully, Manley and Koerner are Commissioners of the New York State Tax Commission. Defendant Maloney is the Director of the Sales Tax Bureau of the New York Department of Taxation and Finance. Defendant Willey is the Senior Sales Tax Examiner of the Sales Tax Bureau of the New York State Department of Taxation and Finance.

JURISDICTION

3. Jurisdiction is based upon Title 28 United States Code Section 1331 (federal question), in that the matter in controversy exceeds the sum of \$10,000, exclusive of interest and costs, and arises under the Constitution of the United States, as more particularly set forth below.

Complaint.

4. Jurisdiction is not barred by Title 28 United States Code Section 1341, because the plaintiff does not have a plain, speedy and efficient remedy in the State of New York.

VENUE

5. Venue is proper in this judicial district under Title 28 United States Code Section 1391(b), because the claim arose in this district.

BACKGROUND OF THE CASE

6. Plaintiff was incorporated in Vermont on or about March 25, 1946, under the name Kane-Griffin, Inc. The name of the corporation was changed to Griffin, Inc. on February 4, 1953. The corporation has carried on a retail furniture business in Arlington, Vermont since its formation, and has had a store at its present location on the western side of U.S. Route 7 in Arlington since approximately 1947.

7. A substantial portion of plaintiff's sales are made to persons who are not residents of Vermont, including residents of New York.

8. Articles purchased from plaintiff are sometimes carried away from the store by the purchasers, and, especially with respect to purchases of furniture, are sometimes delivered to the purchaser in trucks owned by Griffin, Inc.

9. For the calendar year 1974, total sales (net of refunds), by plaintiff amounted to \$596,596.00, and total net income after taxes amounted to \$17,530.00.

10. At the close of the calendar year 1974, the total assets of plaintiff amounted to \$259,458.

11. Plaintiff has never been and is not now registered, qualified or authorized to do business in New York State.

Complaint.

12. Plaintiff has never owned any real property in New York State.

13. Plaintiff does not solicit sales in New York State through salesmen or other representatives.

14. Plaintiff has no office, warehouse, or other facility of any kind in New York State.

15. On or about February 21, 1973, George Bradford, an associate sales tax examiner of the New York State Sales Tax Bureau came to plaintiff's place of business for the purpose of conducting an audit of the records of plaintiff, and advised officers of plaintiff that the purpose of such audit was the establishment of sales records upon which to base an assessment of New York state and local sales and use taxes owed by plaintiff.

16. Plaintiff refused to permit Mr. Bradford to conduct an audit.

17. By letter dated April 16, 1975, the Sales Tax Bureau informed plaintiff that defendant Willey will come to plaintiff's place of business at 10:00 a.m. on Wednesday, April 23, 1975, for the purpose of conducting an audit of plaintiff's records in order to determine plaintiff's liability for New York State and local sales and use taxes.

18. Defendant Maloney, by letter dated March 20, 1975, advised plaintiff that defendant Maloney intends to issue assessments for New York State and local sales and use taxes, based upon audit or estimates, dating back to August 1, 1965.

19. Assessments of New York State and local sales and use taxes against plaintiff dating back to August 1, 1965, would amount to a sum in excess of \$10,000.00.

Complaint.

20. The actions of defendant Willey in seeking to audit the records of plaintiff, and of defendant Maloney in seeking to assess New York State and local sales and use taxes against plaintiff, are being taken at the instance and on the instructions of defendants Tully, Koerner and Manley, who, as members of the Tax Commission of the State of New York are the employers and superiors of defendants Willey and Maloney.

21. In the event that defendants cause to be issued against plaintiff assessments for New York state and local sales and use taxes, plaintiff would be without a plain, speedy and efficient remedy in New York State because, inter alia, Section 1138 of the New York Sales and Use Tax law requires that, prior to contesting the amount or legality of any assessment, plaintiff pay the full amount of taxes assessed, plus interest or penalties, or file a bond in an amount sufficient to cover such taxes, interest and penalties. Because of the amounts involved in this case, plaintiff would thus be without any available remedy in New York State.

COUNT ONE

22. The assessment, levy or collection of New York State and local sales and use taxes against plaintiff would create an improper burden upon interstate commerce, in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

COUNT TWO

23. The assessment, levy or collection of New York State and local sales and use taxes against plaintiff, or any steps such as audits, inspections or seizure of property leading thereto, would deprive plaintiff of its property without due process of law, in violation of

Complaint.

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

COUNT THREE

24. The assessment, levy or collection of New York State and local sales and use taxes against plaintiff, or any steps leading thereto such as audits, inspections, or seizure of property, would deny to plaintiff the equal protection of the laws, inasmuch as the defendants have not and could not efficiently impose such burdens uniformly upon all border merchants similarly situated to plaintiff.

WHEREFORE, plaintiff demands:

1. That the Honorable Court issue a declaratory judgment to the effect that the assessment, levy or collection of New York state and local sales and use taxes upon or against plaintiff would violate the commerce, due process and equal protection clauses of the United States Constitution.

2. That the defendants be permanently enjoined from assessing, levying or collection, or taking any steps leading thereto, New York State and local sales and use taxes against or upon plaintiff.

Dated at Bennington, Vermont, April 22, 1975.

GRIFFIN, INC.

BY--WILLIAMS, WITTEN,
CARTER & WICKES
115 Elm Street
Bennington, Vermont 05201

by s/ R. Paul Wickes
R. Paul Wickes
A member of the firm

NOTICE OF CROSS MOTION TO DISMISS.

(SAME TITLE).

SIRS:

PLEASE TAKE NOTICE, that upon the complaint herein and defendants' memorandum of law submitted herewith, the undersigned will move this Court at a time, day and place to be set by this Court for an order dismissing the complaint herein against defendants pursuant to Federal Rules of Civil Procedure Rule 12(b) (1) and (3) for lack of jurisdiction over the subject matter and failure to state a claim upon which relief may be granted.

Dated: Albany, New York
May 8, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Office & P. O. Address
The Capitol
Albany, New York 12224

by:

THOMAS P. ZOLEZZI
Assistant Attorney General
Tel. (518)-474-1394

THERIAULT & JOSLIN, ESQS.
PETER JOSLIN, ESQ.
87 Main Street
Montpelier, Vermont 05602
Tel. (802)-223-2381
Resident Counsel for
Defendants

Motion for Preliminary Injunction.

TO: WILLIAMS, WITTEN, CARTER
& WICKES, ESQS.
115 Elm Street
Bennington, Vermont 05201

MOTION FOR PRELIMINARY INJUNCTION.

(SAME TITLE).

COMES NOW Griffin, Inc., plaintiff in the above-entitled action, and, by its undersigned attorneys, Williams, Witten, Carter & Wickes, moves that the Court issue a preliminary injunction, after notice to the Governor and Attorney General of the State of New York and hearing as required by 28 U.S.C. 2284, and, in support of its motion states the following:

1. Defendants first contacted plaintiff concerning plaintiff's asserted liability with respect to New York States Sales and Use Tax, on or about February 20, 1973. That first contact was followed shortly by a letter addressed to plaintiff's counsel from George Bradford, an agent of the defendants, a copy of which letter is attached hereto as Exhibit "A".

2. In a letter to plaintiff's counsel dated March 29, 1973, a copy of which is attached hereto as Exhibit "B", defendant Maloney's predecessor, Abram J. Cuttler, indicated the legal basis for the defendants' assertion that plaintiff is liable for New York sales tax.

3. On June 4, 1973, at the invitation of agents of the defendants, plaintiff's counsel submitted to the

Motion for Preliminary Injunction.

defendants a memorandum of law outlining the legal basis for plaintiff's contention that it was not required to collect New York State sales tax.

4. On June 12, 1973, agents of the defendant acknowledged receipt of plaintiff's memorandum, by a letter addressed to plaintiff's counsel. A copy of that letter is attached hereto as Exhibit "C".

5. The next communication received by plaintiff or its counsel from the defendants was dated March 10, 1975. A copy of that letter, together with the enclosure, is attached hereto as Exhibit "D".

6. On May 14, 1975, defendants caused to be issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due", showing an amount due of \$218,085.37. A copy of the Notice is attached hereto as Exhibit "E".

7. The Notice referred to in Paragraph 6 hereof is based on an estimate. Plaintiff believes that the actual amount of taxes which would be owing, if plaintiff is liable for these taxes, would be substantially less.

8. The issuance of the aforesaid Notice serves to commence collection procedures and appeal times, under the New York States Sales and Use Tax Law. Under New York law, unless the relief prayed for in this motion is granted, Plaintiff will lose whatever rights it may have to appeal this notice on or about August 11, 1975.

9. Unless the defendants, their agents, employees, and others acting with them, are enjoined from taking any further steps leading toward the collection of the taxes in dispute in this action, and unless the appeal period commenced by the issuance of the Notice is stayed, plaintiff will suffer irreparable injury, for which it will have no adequate remedy at law.

Motion for Preliminary Injunction.

10. The issuance of a preliminary injunction will cause no hardship to the defendants.

WHEREFORE, plaintiff respectfully requests the Honorable Court, after notice and hearing as required by 28 U.S.C. 2284, to enjoin the defendants, their agents, employees, and others acting in concert with them, from taking any further steps leading to the collection of the sales taxes in dispute in this action, and plaintiff further requests that the court order the defendant tax commissioners to stay the 90 day appeal period commenced by the issuance of the Notice of Determination on May 14, 1975, pending resolution of this action.

Dated at Bennington, Vermont, May ___, 1975.

GRIFFIN, INC.

BY--WILLIAMS, WITTEN,
CARTER & WICKES

by _____

R. Paul Wickes
A member of the firm

**Exhibit A — Letter, dated 2-22-73
attached to Motion for Preliminary Injunction.**

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
Albany District Office
State Campus
Albany, N. Y. 12227

State Tax Commission

Norman F. Gallman,
President

A. Bruce Manley
Milton Koerner

Francis X. Maloney
District Tax
Supervisor

February 22, 1973

Mr. John Williams
Attorney at Law
Elm Street
Bennington, Vermont

Dear Mr. Williams:

As you requested, I have enclosed a copy of the New York State Sales and Use Tax Law, as well as several registration cards.

In our telephone conversation of February 21, 1973, I stated the position of the New York State Sales Tax Bureau regarding the operation of your client, Griffin, Incorporated. We feel that they are doing business in New York State and, therefore, are required to collect the state and applicable local sales tax.

If you have any questions, please do not hesitate in contacting me.

**Exhibit A — Letter, dated 2-22-73
attached to Motion for Preliminary Injunction.**

I would appreciate being advised of your clients intentions regarding this matter.

Very truly yours,

s/ George Bradford

George Bradford
Senior Sales Tax Examiner

GB:pt
Enclosures

**Exhibit B — Letter, dated 3-29-73
attached to Motion for Preliminary Injunction.**

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
State Campus
Albany, N. Y. 12227

State Tax Commission	Sales Tax Bureau
Norman F. Gallman, President	Abram J. Cuttler Director
A. Bruce Manley	
Milton Koerner	

March 29, 1973

William H. Williams, II, Esq.
Williams, Witten & Carter
115 Elm Street
Bennington, Vermont 05201

Re: Griffin's of Arlington, Inc.

Dear Mr. Williams:

I have your letter of March 12, 1973 addressed to Mr. Bradford of our Albany District Office. Mr. Bradford has consulted with me regarding Griffin's sales tax liability in the light of its activities in New York.

This Department's Counsel has held that the National Bellas Hess case is controlling and that any other New York activity constitutes sufficient nexus to require a vendor to charge, collect and remit the New York State and local sales or use tax. National Bellas Hess was limited to interstate solicitation by mail and interstate delivery by mail or common carrier. Griffin has some known New York activities beyond the limited scope of Bellas Hess, such as delivery in its own vehicles and local advertising. There may be other

**Exhibit B — Letter, dated 3-29-73
attached to Motion for Preliminary Injunction.**

activities of which we have no immediate knowledge -- repairs, set ups, etc.

I suggest that you voluntarily permit Mr. Bradford to examine Griffin's books and records, especially as they pertain to New York customers. I am sure you are aware of our right to make a direct assessment against the purchaser.

I would also suggest that you give serious consideration to registering on a voluntary basis. It has been the experience of several border states (especially since sales tax is nearly universal) that customer relations outweigh tax advantages when purchaser assessments become a factor.

Mr. Bradford will contact you in the near future.

Very truly yours,

s/ Abram J. Cuttler

Abram J. Cuttler
Director, Sales Tax Bureau

cc--Mr. Bradford

Exhibit C – Letter, dated 6-12-73
attached to Motion for Preliminary Injunction.

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
State Campus
Albany, N. Y. 12227
Telephone 474-2121

RPW

State Tax Commission

Sales Tax Bureau

Norman F. Gallman,
President

Abram J. Cuttler
Director

A. Bruce Manley
Milton Koerner

June 12, 1973

John H. Williams, II, Esq.
Williams, Witten & Carter
115 Elm Street
Bennington, Vermont 05201

Re: Griffin's of Arlington

Dear Mr. Williams:

The memorandum submitted with your letter of June 5, 1973 is being forwarded to Saul Heckelman, Counsel, for his consideration.

When he has completed his review, he will reply directly to you.

Very truly yours,

s/ Kermit J. Smith

Kermit J. Smith
Sales Tax Audit Supervisor

cc--Mr. Bradford

Exhibit D(1) – Letter, dated 3-10-75.
attached to Motion for Preliminary Injunction.

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
State Campus
Albany, N. Y. 12227

State Tax Commission

Sales Tax Bureau

Saul Heckelman,
Acting Commissioner
A. Bruce Manley
Milton Koerner

Francis X. Maloney
Director

March 10, 1975

John H. Williams II, Esq.
Williams, Witten & Carter
115 Elm St.
Bennington, VT 05201

RE: Griffins of Arlington, Inc.

Dear Mr. Williams:

The information submitted with your letter of June 5, 1973, has been considered and it is the Department's position that their activities which consist of deliveries into New York State by their own vehicles, repairs in New York State by their employees and advertising on New York State radio stations and in New York State newspapers constitutes nexus in this state and requires registration with the Sales Tax Bureau.

I have enclosed a copy of the Tax Department's News Release No. 33, issued in July 1974, which confirms this position. The release refers to merchants located in New Jersey but applies to all merchants with similar situations.

Exhibit D(1) — Letter, dated 3-10-75
attached to Motion for Preliminary Injunction.

I will notify Mr. George Bradford of the field audit section to re-contact your client so an examination of his books and records may be made to establish the correct sales tax liability. Also, a registration form must be filed so that tax may be collected in the future.

Very truly yours,

s/ Francis X. Maloney

Francis X. Maloney
Director, Sales Tax Bureau

Enclosure

**Exhibit D(2) — Tax Department News Release No. 33
attached to Motion for Preliminary Injunction.**

NEW YORK STATE DEPARTMENT OF TAXATION AND
FINANCE

State Campus

Albany, N. Y. 12227

TAXATION AND FINANCE
Mario A. Procaccino, Commissioner

Walter J. Baker
Director of Public Relations
(518) 457-4242

For immediate use. . .

Release No. 33

ALBANY, N. Y., July 8, 1974 -- Roadblocks set up to discover shipments of household furniture, appliances and other taxable merchandise trucked into New York by New Jersey merchants without collecting the the New York sales tax have turned up several violators, State Tax Commissioner Mario A. Procaccino said today.

The roadblocks, conducted last month at three bridges leading from New Jersey to Staten Island by New York State tax agents and local police, were prompted, Commissioner Procaccino said, by complaints from Staten Island merchants that some New Jersey vendors were making deliveries to Staten Island customers without collecting the sales tax.

As a result, neither the New York nor the New Jersey sales tax was being collected on these purchases. A New Jersey vendor who makes deliveries into New York State by his own or leased vehicles is required to register with the New York State Sales Tax Bureau.

During the roadblocks last month, State sales tax auditors and local police checked more than 150 trucks entering Staten Island from New Jersey over the Goethals Bridge, the Outerbridge Crossing and the Bayonne Bridge.

Exhibit D(2) — Tax Department News Release No. 33
attached to Motion for Preliminary Injunction.

Most of the trucks were operated by manufacturers or vendors who are registered with the New York States Sales Tax Bureau, Commissioner Procaccino said. However, 14 trucks were not and these vendors are being contacted by the Sales Tax Bureau and advised of their liability to collect and remit the New York sales tax on purchases which they deliver into this State.

New York customers who made tax-free purchases in New Jersey are not exempt from the New York State and local sales tax. They are required to pay the tax directly to the State Sales Tax Bureau when an out-of-State vendor does not collect it. Purchasers who do not voluntarily report the tax may be contacted by the Sales Tax Bureau regarding their tax liability.

Commissioner Procaccino, who said the roadblock operation of Staten Island was "highly successful," promised similar surveys periodically to enforce compliance with the Tax Law.

Exhibit E(1) — Notice
attached to Motion for Preliminary Injunction.

ST-570 (10/65)

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
SALES TAX BUREAU
STATE CAMPUS
Albany, New York 12226
NOTICE OF DETERMINATION AND DEMAND
FOR PAYMENT OF SALES AND USE TAXES DUE

Notice Number	90,756,431
Date of Notice	May 14, 1975
Identification Number	Unregistered

Griffin, Inc.
U.S. Route 7
Arlington, Vermont

Make payment promptly at your State District Tax Office.
TCB - Albany Z
Make remittance payable to New York State Sales Tax Bureau.

Please show notice number on face of check or money order.

Retain one copy of this notice with your payment.

NOTE: This determination shall be final unless an application for a hearing is filed with the State Tax Commission within 90 days from the date of this notice or unless the Tax Commission shall redetermine the tax.

The tax stated below is for the period August 1, 1965 to February 28, 1974.

Explanation:	(Brought forward from attachment)		Amount Now Due
Period Ended	Tax	Penalty & Interest to 5/20/75	Total
2/28/74	\$ 5,190.39	\$ 1,660.92	\$ 6,851.31
5/31/74	5,190.39	1,349.50	6,539.89
8/31/74	5,190.39	1,038.08	6,228.47
11/30/74	5,190.39	726.65	5,917.04
2/28/75	5,190.39	415.23	5,605.62
	<u>\$13,421.62</u>	<u>\$ 74,663.75</u>	<u>\$218,085.37</u>
Total Amount Due			\$218,085.37
Distribution:	0000 \$23,108.11	3808 \$ 6,863.57	
	0008 7,754.93	3878 895.25	
	0002 17,896.05	3872 16,114.50	
	0100 5,169.97	3850 198.84	
	0108 5,468.21	3858 5,488.11	
	0178 8,948.00	3838 715.84	
	0172 31,318.05	3832 12,527.25	
	3800 954.94	9999 74,663.75	

JW:db

Note: In order to expedite the crediting of your payment, please use the enclosed envelope to forward your reply to the Tax Compliance Bureau, State Campus, Albany, New York 12227.

The amount shown above is a balance due on your account. Prompt payment will avoid additional interest.

**Exhibit E(2) – Attachment to Notice
attached to Motion for Preliminary Injunction.**

ST 572 (11-72)

ATTACHMENT TO ST-570 OR ST-571

Griffin, Inc.
U. S. Route 7
Arlington, Vermont

Police Number
90,756,431
Identification Number
Unregistered

For Period August 1, 1965 to February 28, 1974

Explanation: The following tax is determined under the Provisions of Section 1138 of the Sales Tax Law, and is based on information contained in documents submitted in litigation against the State Tax Commission. It would be subject to modification upon audit of Corporation's books and records.

Period Ended	Tax	Penalty & Interest to 5/20/75	Total
8/31/65	\$ 596.60	\$ 715.20	\$ 1,311.80
11/30/65	1,789.78	2,094.04	3,883.82
2/28/66	1,789.78	2,040.35	3,830.13
5/31/66	1,789.78	1,986.66	3,776.44
8/31/66	1,789.78	1,932.96	3,722.74
11/30/66	1,789.78	1,879.27	3,669.05
2/28/67	1,789.78	1,825.58	3,615.36
5/31/67	1,789.78	1,771.88	3,561.66
8/31/67	1,789.78	1,718.19	3,507.97
11/30/67	1,789.78	1,664.50	3,454.28
2/29/68	1,789.78	1,610.80	3,400.58
5/31/68	2,386.31	2,076.09	4,462.40
8/31/68	2,386.31	2,004.50	4,390.81
11/30/68	2,386.31	1,932.91	4,319.22
2/28/69	2,744.42	2,140.65	4,885.07
5/31/69	3,698.91	2,774.18	6,473.09
8/31/69	3,997.22	2,878.00	6,875.22
11/30/69	3,997.22	2,758.06	6,755.28
2/28/70	3,997.22	2,638.17	6,635.39
5/31/70	4,295.49	2,706.16	7,001.65
8/31/70	4,295.49	2,577.29	6,872.78
11/30/70	4,295.49	2,448.43	6,743.92
2/28/71	4,295.49	2,319.56	6,615.05
5/31/71	4,295.49	2,190.70	6,486.19
8/31/71	5,190.39	2,491.39	7,681.78
11/30/71	5,190.39	2,335.68	7,526.07
2/29/72	5,190.39	2,179.96	7,370.35
5/31/72	5,190.39	2,024.25	7,214.64
8/31/72	5,190.39	1,868.54	7,058.93
11/30/72	5,190.39	1,712.83	6,903.22
2/28/73	5,190.39	1,557.12	6,747.51
5/31/73	5,190.39	1,401.41	6,591.80
8/31/73	5,190.39	1,245.69	6,436.08
11/30/73	5,190.39	1,072.35	6,262.74

AFFIDAVIT OF ARTHUR E. WICKENDEN.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GRIFFIN, INC.,

Plaintiff,

v.

JAMES H. TULLEY, JR., et al.,

Defendants.

I, ARTHUR E. WICKENDEN, being duly sworn, upon my oath do depose and say the following:

1. I am the President of the Catamount National Bank of North Bennington, Vermont.

2. I have reviewed the balance sheet of Griffin, Inc. as of December 31, 1974, prepared by Robert J. Dimke.

3. I have been advised that the State of New York Sales Tax Bureau has issued a "Notice of Determination and Demand for Payment of Sales and Uses Taxes Due", in the amount of \$218,085.37.

4. I have been advised that Griffin, Inc. disputes its liability for any part of this claim.

5. Despite the contention of Griffin, Inc., that it is not liable for these taxes, the existence of the claim represents at least a contingent liability of the corporation.

6. It is my opinion that the existence of this contingent liability for any significant period of time will have a substantial inhibiting effect upon the ability of Griffin, Inc., to obtain credit to meet its needs in the ordinary course of its business.

Affidavit of Robert J. Dimke.

Date: May 23, 1975

s/ Arthur E. Wickenden
Arthur E. Wickenden

(Sworn to on 5-23-75)

AFFIDAVIT OF ROBERT J. DIMKE.

(SAME TITLE).

I, ROBERT J. DIMKE, being duly sworn, upon my oath do depose and say the following:

1. I am an independent public accountant, with offices in Bennington, Vermont.
2. I have served, for several years, as the accountant to the plaintiff in this action, Griffin, Inc.
3. It is my opinion that the existence of a claim by the state of New York for sales taxes in the amount of \$218,000.00 would, as a matter of accounting practice, be required to be shown on the balance sheet of plaintiff, at least as a contingent liability.
4. I am of the opinion, based upon my knowledge of the plaintiff's business, and my experience as an accountant, that the existence of such a contingent liability would seriously impair the ability of the plaintiff to carry on its business, because of its effect upon the plaintiff's ability to secure the credit which it needs in the ordinary course of its business.

Affidavit of John Lonergan.

5. I am also of the opinion that it would be impossible for Griffin, Inc., to raise, by borrowing or otherwise, \$218,000.00 for deposit with the New York Tax Commission, if such a deposit were required to prosecute an appeal.

Date: May 29, 1975

s/ Robert J. Dimke
Robert J. Dimke

(Sworn to on 5-29-75)

AFFIDAVIT OF JOHN LONERGAN.

(SAME TITLE).

I, JOHN LONERGAN, being duly sworn, upon my oath do depose and say the following:

1. I am the President of Lonergan & Thomas, Inc., insurance agents, with offices in Bennington and Arlington, Vermont.
2. For many years I have been the principal insurance agent providing insurance for the plaintiff in this action, Griffin, Inc.
3. I have been asked by plaintiff's counsel to determine whether a bond securing taxes, interest, penalties and court costs could be obtained by the plaintiff, if such a bond were necessary to prosecute appeal procedures in the courts of New York State.

Stipulation.

4. I am of the opinion, based upon my experience and my investigation of this matter, that such a bond is either not available, or, if available, would have to be fully collateralized or would bear a premium in an amount nearly equal to the amount to be secured by the bond.

Date: May 29, 1975

s/ John F. Lonergan
John Lonergan

(Sworn to on 5-29-75)

STIPULATION.

(SAME TITLE).

COME NOW the parties hereto, and, by their undersigned attorneys, stipulate as to the following facts. The parties agree that this stipulation is entered into for the purpose of expediting proceedings with respect to defendants' motion to dismiss and plaintiff's motion for a preliminary injunction, and this stipulation is entered into without prejudice to the right of either party to prove different or additional facts at later stages of this proceeding.

I. Background Facts

1. Plaintiff was incorporated in Vermont on or about March 25, 1946, under the name Kane-Griffin,

Stipulation.

Inc. The name of the corporation was changed to Griffin, Inc. on February 4, 1953. The corporation has carried on a retail furniture business in Arlington, Vermont since its formation, and has had a store at its present location on the western side of U.S. Route 7 in Arlington, Vermont since approximately 1947.

2. Plaintiff store is located approximately 25 miles from the Massachusetts-Vermont border, and approximately 6 miles from the New York-Vermont border.

3. A substantial portion of plaintiff's sales are made to persons who are not residents of Vermont. A substantial portion of such interstate sales are to residents of New York.

4. Articles purchased from plaintiff are sometimes carried away from the store by purchasers, and especially with respect to purchases of furniture, are sometimes delivered to the purchaser in trucks owned by plaintiff.

5. Defendants Tully, Manley and Koerner are Commissioners of the New York State Tax Commission. Defendant Maloney is the Director of the Sales Tax Bureau of the New York Department of Taxation and Finance. Defendant Willey is the Senior Sales Tax Examiner of the Sales Tax Bureau of the New York State Department of Taxation and Finance.

6. On or about February 21, 1973, George Bradford, an associate sales tax examiner of the New York State Sales Tax Bureau came to plaintiff's place of business for the purpose of conducting an audit of the records of plaintiff, and advised officers of plaintiff that the purpose of such audit was the establishment of sales records upon which to base an assessment of New York State and local sales and use taxes owed by plaintiff. Plaintiff refused to permit Mr. Bradford to conduct an audit.

Stipulation.

7. On April 23, 1975, defendant Willey came to plaintiff's place of business for the purpose of conducting an audit of plaintiff's records in order to determine plaintiff's liability under New York's Sales and Use Tax Law. Plaintiff refused to permit such an audit.

8. The action of defendant Willey in seeking to audit the records of plaintiff, and of defendant Maloney in seeking to assess New York state and local sales and use taxes against plaintiff, was taken at the instance and on the instructions of defendants Tully, Koerner and Manley, who, as members of the Tax Commission of the State of New York are the employers and superiors of defendants Willey and Maloney.

9. On May 14, 1975, defendants caused to be issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due", showing an amount due of \$218,085.37.

10. The Notice referred to in Paragraph 9 hereof is based on an estimate.

11. The issuance of the aforesaid Notice serves to commence collection procedures and appeal times, under the New York State Sales and Use Tax Law. Under New York law, Plaintiff will lose whatever rights it may have to appeal this notice to the New York State Tax Commission on or about August 11, 1975.

II. Contacts of Plaintiff With New York State

A. In General

1. Plaintiff has never been and is not now registered, qualified or authorized to do business in New York State.

2. Plaintiff has never owned any real property in New York State.

Stipulation.

3. Plaintiff does not solicit sales in New York State through salesmen, agents, or other representatives.

4. Plaintiff has no office, warehouse, showroom, or other facility of any kind in New York State.

B. Deliveries

1. Furniture purchased by residents of New York State from plaintiff is typically delivered to the purchaser in trucks owned by plaintiff, or occasionally by common carrier.

2. Such deliveries are made by employees of plaintiff. Furniture sometimes requires assembling or "setting-up", such as the attachment of legs to a table. This generally makes it impractical to use common carriers to deliver furniture.

C. Repairs

1. Employees of plaintiff enter New York State infrequently for the purpose of repairing furniture purchased from plaintiff.

2. A typical such repair would be the "touching-up" of scratches on wooden furniture.

3. No charge is made for such repair services.

D. Advertising

1. Plaintiff advertises through advertising media located in the Albany-Schenectady-Troy area of New York, and in Vermont.

2. Such advertising includes primarily radio advertising, newspaper advertising, occasional television advertising, and one roadside sign located near the Vermont border on New York Route 7.

Stipulation.

3. The Albany-Schenectady-Troy area of New York is the only substantial metropolitan area located within plaintiff's primary marketing area.

4. WBTN, of Bennington, Vermont, is the only commercial radio station located in Bennington, Vermont. WBTN cannot be heard using ordinary radio receivers in large parts of Bennington County. Plaintiff advertises on WBTN.

5. WCAX, located in Burlington, Vermont, is the only commercial television station located in the state of Vermont.

6. WCAX-TV can, with few exceptions, be received in Bennington County only by cable. Cable service carrying WCAX-TV has only recently become available in Bennington, Vermont. Plaintiff does not advertise on WCAX-TV.

7. Bennington County, Vermont relies primarily on the Albany-Schenectady-Troy area of New York for radio and television broadcast media. For example, the three primary television stations which are received without cable in Bennington County, Vermont are WTEN (CBS), WRGB (NBC), and WAST (ABC), all located in the Albany-Schenectady-Troy area.

8. Plaintiff advertises on certain radio stations (and, in the past, has advertised on certain television stations) whose facilities are located entirely within New York State, and whose broadcast area includes southwestern Vermont.

9. Plaintiff advertises in the weekly joint television listings section of The Times-Union and The Knickerbocker News/Union-Star. These Newspapers are published in Albany, New York and circulated primarily in the Albany-Schenectady-Troy area of New York and in southwestern, Vermont. A copy of the advertisement

Stipulation.

published in the listings for June 7-14, 1975 is attached here to as Exhibit "A."

E. Credit and Collection

1. Plaintiff sells furniture exclusively for cash, check, or bank credit cards, and does not itself extend credit to customers.

Dated this 7th day of July, 1975.

GRIFFIN, INC.

BY--WILLIAMS, WITTEN,
CARTER & WICKES
Its Attorneys

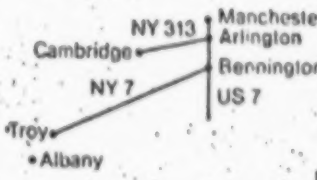
by s/ R. Paul Wickes
R. Paul Wickes
A member of the firm

JAMES H. TULLEY, JR.,
ET AL.

BY--LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

by s/ Thomas P. Zolezzi
Thomas P. Zolezzi
Assistant Attorney General

**Exhibit A — Advertisement
attached to Stipulation.**



The prices at GRIFFIN'S are so much lower than normal retail markup prices that we never have had a "sale" — and because of this low pricing policy of top quality furniture, we never will.

You are cordially invited to visit us on any day of the week including Sundays, until 5:30 p.m.

GRIFFIN'S
Where good furniture costs less
ARLINGTON, VERMONT 05250
Telephone (802) 375-2800, 375-2310

June 7-14, 1975

EXCERPTS FROM TRANSCRIPT OF HEARING of 8-1-75.

[8]

* * * * *

JUDGE COFFRIN: Well, aren't they submitting to the jurisdiction of the taxing authorities of the State of New York?

MR. ZOLEZZI: By filing a request for a hearing?

JUDGE COFFRIN: Yes.

MR. ZOLEZZI: No, they would not be submitting to New York State jurisdiction.

JUDGE OAKES: Well, on what do you base that?

[9]

MR. ZOLEZZI: On the word of counsel that this would not be submitting them to New York State overall jurisdiction it would just be a request for a hearing and then that, — it will be strictly for the purpose of stopping the statute from running.

* * * * *

[10]

MR. ZOLEZZI: If the plaintiff can come in and show that it falls into the MILLER case or the BELLA HESS case or any of those cases upon which it relies, the Tax Commission, upon review of the evidence, will annul the determination and the matter will be ended.

* * * * *

Excerpts from Transcript of Hearing of 8-1-75.

[13]

* * * * *

JUDGE HOLDEN: If you have the right to go into the, if the New York Tax Department, has the right to go, the right to examine the plaintiff's books in this case, what's to prevent the New York Tax Department from going to every establishment in Vermont or in New Jersey or Pennsylvania and say, "We think that you're selling goods, or delivering goods to New York State purchasers, and we want to go through your books and we want to see whether this is so or not, and we are going to make an assessment."

MR. ZOLEZZI: Well, I think that it's really a matter of practical application. In the present case the Complaint was made to the New York State Department of Taxation by a local furniture merchant who says, "merchants are coming into the State, they are selling articles and they are not charging tax. I have to charge tax which automatically makes my prices higher than theirs. Even if I was to charge the same amount, I have to charge tax and they are invading our area."

Based on that, that's when the New York State Department of Taxation and Finance went out to investigate the complaint. And, I seriously doubt that the Department of Taxation would hit every out-of-state merchant to determine

[14]

whether he was making deliveries into the State.

JUDGE OAKES: They would only hit those where there was a complaint by the local merchant?

MR. ZOLEZZI: By the local merchant.

Excerpts from Transcript of Hearing of 8-1-75.

[14]

JUDGE OAKES: Which might be great in number, or small in number?

MR. ZOLEZZI: It's possible.

* * * * *

[18]

* * * * *

JUDGE OAKES: Can the Appellate Division enjoin the enforcement of the, - of the - -

MR. ZOLEZZI: Not at the Article 78 level. In other words if he brings an Article 78 proceeding to review the determination, the Appellate Division cannot enjoin, --

JUDGE OAKES: "Collection"?

MR. ZOLEZZI: "Collection." As a matter of practice, the Tax Department does not enforce collection. But the Appellate Division cannot enjoin them, - - - in an Article 78 proceeding.

* * * * *

LETTER OF THOMAS P. ZOLEZZI TO CLERK U.S.
DISTRICT COURT, DISTRICT OF VERMONT, dated
8-4-75.

Telephone (518) 474-1394

August 4, 1975

Honorable Edward J. Trudell, Clerk
United States District Court
Burlington, Vermont

Re: Griffin, Inc. v. Tulley, et al.
Civil Action File No. 75-104

Dear Mr. Trudell:

The above-mentioned case was argued before a three-judge court in Brattleboro, Vermont on August 1, 1975. At that hearing, the Honorable James L. Oakes, United States Circuit Judge, inquired as to whether the New York State Department of Taxation and Finance would be willing to cancel the assessment in the above-mentioned case and reissue the said assessment. This request was made because the time in which the plaintiff could request a hearing for a redetermination by the New York State Tax Commission as to the assessment will expire on August 11, 1975. By cancelling the assessment and reissuing it, the plaintiff would have an additional 90 days from the date of the reissued assessment to request a hearing for a redetermination. This 90-day extension would also allow the three-judge court sufficient time to determine whether it has jurisdiction over this action.

Please be advised that the New York State Department of Taxation and Finance has agreed to cancel the assessment and reissue an up-dated assessment against the plaintiff. The assessment shall be canceled and reissued no later than August 8, 1975.

Letter of Thomas P. Zolezzi to Clerk U.S. District
Court, District of Vermont, dated 8-4-75.

Honorable Edward J. Trudell, Clerk
United States District Court

2.

By telephone conversation of August 4, 1975, I informed Judge Oakes' law clerk that the assessment would be canceled and reissued.

This cancellation and reissuing of the assessment is being made with the understanding that no rights of the New York State Department of Taxation and Finance shall be jeopardized by said cancellation and reissuance of the assessment.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

By

THOMAS P. ZOLEZZI
Assistant Attorney General

TPZ:jb

cc: Williams, Witten, Carter & Wickes, Esqs.
Attention: R. Paul Wickes, Esq.

Honorable James L. Oakes

Honorable Max Kuperman

CANCELLATION OF ASSESSMENT AND STATEMENT OF REISSUE.

ST-572 (11-72)

ATTACHMENT TO ST-570 OR ST-571

Griffin, Inc.
U.S. Route 7
Arlington, Vermont

Notice Number
90,736,909
Identification Number
Un-Registered

August 8, 1975

ECB-Albany-3

Per Period: August 1, 1965 to May 31, 1975

Explanation: The following tax is determined on the basis of
information obtained from the Department of Taxes, State of Vermont.
It would be subject to modification upon audit of corporation's books
and records.

Penalty & Interest

Period Ended	Tax Due	to 8/20/75	Total
8/31/65	\$ 761.56	\$ 936.72	\$1,698.28
11/30/65	2,284.68	2,741.62	5,026.30
2/28/66	2,284.68	2,673.08	4,957.76
5/31/66	2,284.68	2,604.54	4,889.22
8/31/66	2,284.68	2,535.99	4,820.67
11/30/66	2,284.68	2,467.45	4,752.13
2/28/67	2,284.68	2,398.91	4,683.59
5/31/67	2,284.68	2,330.37	4,615.05
8/31/67	2,284.68	2,261.83	4,546.51
11/30/67	2,284.68	2,193.29	4,477.97
2/29/68	2,284.68	2,124.75	4,409.43
5/31/68	3,427.02	3,084.32	6,511.34
8/31/68	3,427.02	2,981.51	6,408.53
11/30/68	3,427.02	2,878.70	6,305.72
2/28/69	3,807.80	3,084.32	6,892.12
5/31/69	4,721.66	3,682.89	6,404.55
8/31/69	5,248.24	3,936.18	9,184.42
11/30/69	5,248.24	3,778.73	9,026.97
2/28/70	5,002.76	3,451.90	8,454.66
5/31/70	5,244.20	3,461.17	8,705.37
8/31/70	5,244.20	3,303.85	8,548.05
11/30/70	5,244.20	3,266.52	8,390.72
2/28/71	6,127.40	3,492.62	9,620.02
5/31/71	6,568.99	3,547.25	10,116.24
8/31/71	7,937.53	4,048.14	11,985.67

BEST COPY AVAILABLE

Cancellation of Assessment and Statement of Reissue.

ST-570 (10-65)

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
SALES TAX BUREAU
STATE CAMPUS
Albany, New York 12226

NOTICE OF DETERMINATION AND DEMAND
FOR PAYMENT OF SALES AND USE TAXES DUE

Notice Number
90,736,909
Date of Notice
August 8, 1975
Identification Number
Un-Registered

Griffin, Inc.
U.S. Route 7
Arlington, Vermont

Make payment promptly at your State District Tax
Office.

Make remittance payable to New York State Sales
Tax Bureau.

Please show notice number on form of check or
money order.

Retain one copy of this notice with your payment.

NOTE: This determination shall be final unless an
application for a hearing is filed with the State Tax
Commission within 90 days from the date of this
notice or unless the Tax Commission shall otherwise
direct the Tax.

The tax stated below is for the period

Explanation:
Continued

Penalty & Interest

Period Ended	Tax Due	to 8/20/75	Total
11/30/71	\$7,937.53	\$ 3,810.01	\$11,747.54
2/29/72	8,037.41	3,616.83	11,654.24
5/31/72	8,087.35	3,396.69	11,484.04
8/31/72	8,087.35	3,154.07	11,241.42
11/30/72	8,087.35	2,911.45	10,998.80
2/28/73	6,464.16	2,133.17	8,597.33
5/31/73	5,652.56	1,695.77	7,348.33
8/31/73	5,652.56	1,526.19	7,178.75
11/30/73	5,652.56	2,487.13	8,139.69
2/28/74	5,970.98	2,268.97	8,239.95
5/31/74	6,130.19	1,961.66	8,091.85
8/31/74	6,130.19	1,593.85	7,724.04
11/30/74	6,130.19	1,226.04	7,356.23
2/28/75	5,310.65	743.49	6,054.14
5/31/75	4,900.88	392.07	5,292.95
Total	\$192,516.55	\$106,064.04	

\$298,580.59

Distribution:

0000-\$28,050.80	0008-\$10,154.22	0002-\$24,406.76
0100-\$8,884.88	0108-\$7,052.55	3838-\$1,094.82
0178-\$11,845.38	0172-\$42,711.83	3800-\$1,827.76
3808-\$8,785.60	3878-\$1,368.55	3872-\$21,966.30
3850-\$253.85	3858-\$7,028.70	
3832-\$17,084.55	9999-\$106,064.04	

The amount shown above is a balance due on your
account. Prompt payment will avoid additional interest.

Cancellation of Assessment and Statement of Reissue.

ATTACHMENT TO ST-570 OR ST-571

Notice Number
90,756,909
Identification Number
Un-Registered

August 8, 1975

TCB-Albany-Z

Griffin, Inc.
U. S. Route 7
Arlington, Vermont

Note: This Notice supercedes Notice Number
90,756,431 dated 5/14/75.

Note: In order to expedite the crediting of your payment,
please use the enclosed envelope to forward your reply
to the Tax Compliance Bureau, State Campus, Albany,
New York 12227

JM:sec

LETTER OF R. PAUL WICKES TO CLERK, U.S. DISTRICT COURT, DISTRICT OF VERMONT, dated 8-14-75.

WILLIAMS, WITTEN, CARTER & WICKES
ATTORNEYS

115 Elm Street, Bennington, Vermont 05201
802-442-8111

August 14, 1975

Mr. Edward J. Trudell, Clerk
United States District Court
Federal Building
Burlington, Vermont

Re: Griffin, Inc. v. Tulley, et al.
Civ. No. 75-104

Dear Mr. Trudell:

I am writing to advise the Court of two developments in this case which have occurred since the hearing on August 1, 1975. Because these matters may effect the disposition of the Plaintiff's Motion for a Preliminary Injunction, I would appreciate your bringing this letter to the attention of Judges Oakes, Holden and Coffrin at your earliest convenience.

By letter to you dated August 4, 1975, Mr. Zolezzi indicated that the defendants had agreed to cancel the tax assessment which had been issued on May 14, 1975. My understanding of the purpose of that cancellation, based upon the discussion between Mr. Zolezzi and the Court at the hearing on August 1, was that it was intended to moot the plaintiff's request for a preliminary injunction, by removing the 90-day deadline which follows the issuance of an assessment.

Letter of R. Paul Wickes to Clerk, U.S. District Court,
District of Vermont, dated 8-14-75.

Enclosed is a copy of a new assessment, dated August 8, 1975, which indicates that it "supersedes" the previous assessment. The defendants have done no more than extend the appeal period for another ninety days, to approximately November 7 of this year.

In addition, page 2 of the assessment contains the following statement:

The following tax is determined on the basis of information obtained from the Department of Taxes, State of Vermont.

Although we have not been able to determine the basis on which the defendants obtained such information from the State of Vermont, it would appear that the defendants may have commenced some type of enforcement proceedings, under some agreement between the tax departments of New York and Vermont.

We would suggest, therefore, that our Motion for Preliminary Injunction has not been mooted by the action of the defendants, but continues to require resolution by the Court.

Sincerely yours,

R. Paul Wickes

lmb

cc: Thomas P. Zolezzi, Esq.

OPINION OF UNITED STATES DISTRICT COURT
FOR DISTRICT OF VERMONT.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Griffin, Inc.

v.

James H. Tully, Jr., A. Bruce Manley, Milton
Koerner, Francis X. Maloney and John Willey

Civil Action File No. 75-104

Before: Oakes, Circuit Judge and
Holden and Coffrin, District Judges

Paul R. Wickes, Esq., Williams, Witten, Carter
and Wickes, Bennington, Vermont for plaintiff.

Thomas P. Zolezzi, Esq., Assistant Attorney
General, Albany, New York, and Peter Joslin,
Esq., Theriault and Joslin, Montpelier, Vermont,
for defendants.

COFFRIN, District Judge.

This case arises out of an attempt by various officials of the New York State Tax Commission and the Department of Taxation and Finance to require a Vermont corporation to collect New York Sales and Use Tax revenues.

A. Background

Plaintiff is a Vermont corporation which operates a retail furniture business in Arlington, Vermont, about six miles from the New York-Vermont border. A substantial amount of plaintiff's total sales are made to

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out-of-state customers, and of this interstate business a substantial portion involves New York residents.

On February 21, 1973, an associate sales tax examiner from the New York Sales Tax Bureau came to Griffin's store for the purpose of auditing plaintiff's books to establish a sales record which would then be the basis of an assessment of the New York sales and use taxes claimed to be owed by Griffin.^{1/} Plaintiff refused to allow an audit at that time. Matters rested there for more than two years, but on April 23, 1975, defendant Willey, a senior tax examiner, came to conduct an audit at the direction of defendants Tully, Koerner, and Manley who are members of the Tax Commission. Plaintiff again refused to allow an audit and served the complaint in this lawsuit at that time. Defendants subsequently issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due" showing an amount of \$218,085.37. The assessment was based on an estimate rather than any hard data concerning plaintiff's sales records. Subsequently, a second assessment in the amount of \$298,580.59 was issued which superseded the original notice.^{2/}

Griffin seeks a declaratory judgment that any assessment, levy, or collection against it would violate the Commerce, Due Process, and Equal Protection clauses of the Constitution. Plaintiff also seeks permanent injunctive relief. After receiving the complaint, defendants filed a motion to dismiss on the ground that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341. Plaintiff subsequently filed a motion for a preliminary injunction on May 30, 1975 and in its

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memorandum requested that a three-judge court be convened. This court was convened, and the motions to dismiss and for a preliminary injunction were argued on August 1, 1975.

B. Preliminary Matters

It is clear that except for the possible application of section 1341 we would have jurisdiction of this matter. The complaint raises substantial federal questions arising under the Commerce clause and the fourteenth amendment. Hagans v. Lavine, 415 U.S. 528 (1974). Plaintiff appears to have stated a claim based directly on the constitution and since there is more than \$10,000 in controversy, we have jurisdiction under 28 U.S.C. §1331(a). Additionally, 42 U.S.C. §1983 provides a cause of action for deprivation of constitutional rights under color of state law and we also have jurisdiction under 28 U.S.C. §1343(3).

A three-judge court is appropriate in this case because the complaint seeks to enjoin state officials from executing a state statute,^{3/} raises substantial constitutional questions,^{4/} and alleges a basis for injunctive relief.^{5/} See Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 94 (1974). Only a three-judge court has the authority to issue even an interlocutory injunction. 28 U.S.C. §2281. Although a single judge can entertain a motion to dismiss for lack of subject matter jurisdiction, Id. at 100, it is certainly permissible for a three-judge court to do so, Ammex-Champlain Corp. v. Gallman, Civil Nos. 72-306, 72-310 (N.D.N.Y. Mar. 13, 1973), aff'd 414 U.S. 802 (1973), particularly where consolidation of the motions for hearing may save judicial time and energy.

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C. Motion to Dismiss

We turn first to defendants' motion to dismiss the complaint pursuant to 28 U.S.C. §1341. Although by its terms section 1341 only forbids a district court to award injunctive relief, the policy considerations which underlie the statutory command preclude an award of declaratory relief as well. Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943). Clearly, if we lack the ability to grant Griffin the relief it seeks, the case must be dismissed. In that event, it would be unnecessary to reach the merits of plaintiff's motion for a preliminary injunction.

In support of their motion to dismiss defendants argue that there are two available remedies. The first is an administrative appeal to the Tax Commissioners and from there to the New York courts as set forth in section 1138 of the Sales and Use Tax Law.^{6/} The other remedy is a declaratory judgment action under section 3001 of the New York Civil Practice Law and Rules (CPLR). We conclude, however, that neither is "plain, speedy and efficient" within the meaning of 28 U.S.C. §1341.

1. Administrative Appeal

New York Sales and Use Tax Law section 1138 provides that a taxpayer may request an administrative review of the initial assessment in a proceeding before the Tax Commission. The Commission in turn may be reviewed by a CPLR article 78 proceeding. Article 78 review, however, requires that the taxpayer pay the tax or post a bond to stand for taxes, penalties and interest. Sales and Use Tax Law §1138(a). This prerequisite to judicial review is a major hurdle in Griffin's

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case since plaintiff has been assessed a tax liability of \$298,580.59, a figure it states is well beyond its ability to pay. Defendants point out however, that this figure is only an estimate which might be substantially reduced upon audit. At this juncture we have no way of knowing what figure an audit would disclose. However, even if an audit would result in a lower assessment, plaintiff objects to having to submit to such a procedure at the hands of a state which it claims has no jurisdiction to conduct an audit in any event.

In order to assert its rights or test its claim, Griffin should not be obliged as a condition precedent to make a choice between paying an assessment or posting a bond in an admittedly arbitrary amount or turning over its books and records to a state whose authority it claims is invalid. United States Steel Corp. v. Multistate Tax Commission, 367 F.Supp. 107, 116 (S.D.N.Y. 1973). Whether New York has the authority to require Griffin to collect the New York Sales and Use Tax involves questions of constitutional law, but there is no indication that the Commission is competent to determine constitutional issues.^{7/} The Tax Commission redetermines the tax after an initial assessment has been challenged. The redetermination then can be reviewed "for error, illegality or unconstitutionality or any other reason whatsoever . . ." by an article 78 proceeding. Sales and Use Tax Law §1138(a). Since Griffin does not have to submit to an audit prior to having its constitutional claim heard and since the Tax Commission may be limited to reviewing the computation of tax without competence to resolve constitutional questions, plaintiff and defendants have reached an impasse.

Under the procedures laid down by section 1138 Griffin's first opportunity to air its constitutional claims

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may well be in an article 78 proceeding, but it is not clear that such judicial review would be available to plaintiff if it steadfastly refuses to submit to audit. Presumably, a hearing before the Tax Commission is a prerequisite to an article 78 proceeding, but if plaintiff refuses to submit to Tax Commission authority, then it may jeopardize its article 78 appeal rights. Under these circumstances refusing to allow inspection of books and records might be likened to a failure to exhaust administrative procedures prior to the right to appeal.

In addition to doubts concerning the adequacy of article 78 review, there is one practical consideration of the utmost significance. Even if judicial review is technically available for all issues, Griffin may be unable to present its arguments because of the prepayment or bond requirement. It is fair to assume that the initial assessment of \$298,580.59 would remain unchanged since the Commission would be unable to revise or verify the preliminary estimate without examining Griffin's books and records. Since it is clear that Griffin is unable to pay the present assessment or to post bond in that amount, the issue is whether the requirement that plaintiff post bond or prepay the tax plus penalties and interest is a condition which renders an article 78 proceeding inadequate for purposes of section 1341. The general rule is that a state may require a taxpayer to litigate from a refund posture even when he questions the validity of the tax itself. Great Lakes Dredge & Dock Co. v. Huffman, supra at 301. This remedy may be harsh, but there is no indication that it violates due process. Jackson v. Metropolitan Edison Co., 483 F.2d 754, 761 (3d Cir. 1973), aff'd 419 U.S. 345 (1974). But in some instances the assessment poses such a heavy burden

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that to deny equitable relief is to deny judicial review entirely. Denton v. City of Carrollton, 235 F.2d 481, 485 (5th Cir. 1956). In such instances a federal court may award equitable relief.

Extraordinary circumstances are present in this case which bring Griffin within the exception to the general rule. New York officials have admitted that the assessment represents an estimate of a liability which is itself contingent on whether the tax may be constitutionally applied. Even if it is liable for some tax, plaintiff claims that this estimate is grossly inflated. Plaintiff should not have to prepay or post bond in an entirely arbitrary amount that may bear little relationship to any eventual liability. Second, the bond or prepayment requirement is a prohibitive barrier to an article 78 hearing because Griffin cannot raise the necessary funds by borrowing or otherwise. A bond is not available except at a premium nearly equal to its face value or unless fully supported by collateral. (Affidavits of Robert Dimke, John Lonergan). Finally, an assessment of this magnitude is clearly coercive in its effect. Griffin must carry the assessment on its books as a contingent liability which will severely hamper it in obtaining the credit it needs in the ordinary course of business. (Affidavits of Robert Dimke, Arthur Wickenden). If Griffin cannot carry on its affairs with this assessment outstanding, it must accede to the desires of the New York State officials or face the dire consequences customarily attendant upon a business which cannot meet its credit requirements.

In short, we have no assurance that New York courts would even entertain a suit seeking review of a final determination of tax liability where the taxpayer refused to submit to the Tax Commission's authority.

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Furthermore, the prepayment or bond requirement in effect denies article 78 review in this instance. Consequently, we are of the opinion that the administrative review procedure does not afford a "plain, speedy or efficient remedy."

2. Declaratory Judgment

Defendants claim that New York's CLPR §3001 provides for a declaratory judgment remedy. They argue that Griffin could present its constitutional claims without having to submit to an audit, prepay the assessed tax, or post bond in that amount. There are several difficulties with this remedy, however, which lead us to conclude that it does not satisfy section 1341.

Section 1140 of the Sales and Use Tax Law provides:

§1140. REMEDIES EXCLUSIVE.--The remedies provided by sections eleven hundred thirty-eight and eleven hundred thirty-nine shall be exclusive remedies available to any person for the review of tax liability imposed by this article; and no determination or proposed determination of tax or determination on any application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any action or proceeding other than a proceeding under article seventy-eight of the civil practice law and rules. (Emphasis added).

While the language of section 1140 apparently forecloses any declaratory judgment remedy, defendants claim that the case law has substantially diffused the effect of this forceful statement. New York courts have held that a declaratory judgment action may be

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maintained despite statutory language making a review proceeding exclusive if the taxpayer challenges the tax as unconstitutional or inapplicable to his case. Richfield Oil Corp. v. City of Syracuse, 287 N.Y. 234, 239 (1942). The general rule stated in Richfield has been applied specifically to section 1140 by a lower appellate court. Hospital Television Systems, Inc. v. New York State Tax Commission, 41 A.D.2d 576 (3d Dept. 1973). In addition, some federal cases have assumed that a declaratory judgment remedy was available in dismissing taxpayer actions for injunctive relief on the grounds that an adequate state remedy existed. Hickmann v. Wujick, 488 F.2d 875, 876 (2d Cir. 1973). Ammex-Champlain Corp. v. Gallman, *supra*. Nevertheless there appears to be a contradiction between the plain language of section 1140 and the few cases we have found which cloaks this issue in some uncertainty.

When there is uncertainty with regard to the adequacy of a state remedy, a federal court may retain jurisdiction and give appropriate relief. Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105-106 (1944). Clearly, if a remedy is entirely unavailable, it would be inadequate. Since it is not certain that a declaratory judgment is available in this instance, we cannot be sure that the remedy in question is adequate.

But even if it were certain that section 3001 is available, a declaratory remedy standing alone may still be inadequate. Spector Motor Co. v. McLaughlin, *supra*.^{8/} In Ammex the court ruled that the apparent inability of New York courts to give injunctive relief was not crucial, but there are important distinctions between Ammex and this case which lead us to the opposite conclusion. Ammex-Champlain sold cigarettes

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and liquor to travelers going from the United States to Canada. The corporation maintained sales offices and warehouses at various points on the New York side of the border. The warehouses were located so that one could only go into Canada after picking up one's merchandise. This unique physical arrangement gave rise to a claim that the sales were exempt from state tax under both the Commerce and Export-Import clauses of the Constitution. The important point is that the corporation was clearly present in New York State, and therefore it could expect to litigate in New York courts. But Griffin's contacts with New York are minimal.^{9/} For this reason it seems unfair to make Griffin litigate in an unfamiliar forum.^{10/} Plaintiff's unfamiliarity with New York courts is a counterweight to the reasons for requiring a taxpayer to raise his objections to an assessment in the courts of the taxing state. This counterweight admonishes us to exact a somewhat higher degree of certainty regarding the adequacy of New York's declaratory judgment remedy than was appropriate in Ammex. But though a higher standard of certainty should obtain, we do not have the same basis for confidence regarding the availability of preliminary relief should the need arise. In Ammex the parties agreed that there would be no collection attempt pending a New York court's decision on the merits, but there is no such stipulation in this case. Defendants argue that preliminary injunctive relief would be available in New York courts, but we have reservations on this score as seemingly did the court in Ammex.

Accordingly, we hold that in the circumstances of this case New York's declaratory judgment remedy is neither so certainly available nor so clearly adequate as to preclude our jurisdiction to issue injunctive relief.

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Since neither of the remedies available to plaintiff in New York are "plain, speedy and efficient," we have the power to grant injunctive relief and this lawsuit need not be dismissed.

D. Motion for Preliminary Injunction

We turn now to Griffin's motion for a preliminary injunction. In deciding whether to grant or deny preliminary relief the two primary considerations are plaintiff's chance of eventual success on the merits and the potential for irreparable injury if interlocutory relief is not granted. It is also important to balance the potential hardship to both plaintiff and defendants and to ascertain where the public interest lies. New York Pathological and X-Ray Laboratories, Inc. v. Immigration and Naturalization Service, Doc. No. 74-2630, at 5668-69 (2d Cir. Aug. 18, 1975).

1. Irreparable Injury

Griffin may well suffer irreparable injury from New York collection attempts once the assessment becomes final. Griffin is vulnerable because it makes deliveries to New York purchasers in its own trucks. If plaintiff continues this practice the trucks and merchandise could be seized.^{11/} Seizures would disrupt business, frustrate customers, and result in loss of sales. Griffin's alternative would be to completely change its present mode of operation. New York may also attempt collection in Vermont by lawsuit and liens on property. In short, vigorous collection attempts could cripple and perhaps destroy Griffin's business.

Another potential injury stems from the fact that Griffin will be unable to contest the amount of its

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liability should we ultimately decide that New York does have the authority to require plaintiff to collect the tax. Griffin claims the current assessment is excessive, but section 1138 requires that anyone wishing to challenge an assessment must request a hearing before the Tax Commission within 90 days of notice. The assessment was issued on August 8, 1975. Unless the 90 day period is tolled, the time for requesting a hearing almost assuredly will have passed before we reach a decision on the merits.

Finally, the assessment will appear as a black mark on Griffin's balance sheet. Griffin must carry the assessment as a contingent liability which will substantially impair plaintiff's ability to secure the credit it needs in the ordinary course of business.

Griffin clearly needs preliminary relief to prevent it from suffering irreparable injury, and defendants will not be harmed by some delay. Although the court takes judicial notice of the fact that some state and municipal governments are currently hard-pressed to meet their financial obligations, collection of this assessment will not make the difference between financial stability and ruin.^{12/} On balance, Griffin deserves protection if it can show a likelihood of success on the merits.

2. Probability of Success on The Merits

New York seeks to hold a Vermont corporation responsible for the collection of New York's sales and use tax on furniture sales to New York residents. In Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-345 (1954), Justice Jackson discussed a similar taxing scheme set up by the State of Maryland. The economic effect of holding Griffin liable for collection of the sales

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and use tax is to protect New York businesses by putting out-of-state retailers on the same footing as local merchants for sales to New York residents. But as distinguished from a direct tax on a sale, liability here arises only on the importation of the furniture into New York, an event which occurs after title has passed and of which Griffin may have no knowledge. Since the sale in Vermont establishes no link between Griffin and New York, the issue is whether Griffin's acts or course of dealing has subjected it to New York's taxing authority or has afforded New York jurisdiction to saddle Griffin with responsibility for tax collection. Due process requires some minimum link between a state and the person, property, or transaction it seeks to tax.

Miller Bros. involved a situation almost identical to the one before us now. A Delaware furniture corporation operating in Wilmington made sales to Maryland residents. Customers sometimes took their purchases with them, but usually Miller Bros. delivered the items in its own trucks or by common carrier. The only difference of any colorable significance between Griffin's operation and those of the Delaware firm is that Miller Bros. advertised only in Wilmington newspapers, radio, and television while Griffin uses media based in the Albany-Schenectady-Troy region of New York. This difference is not important, however, since residents of Bennington County, Vermont, Griffin's primary marketing area, rely on New York media. Miller Bros. advertising reached Maryland and Delaware residents alike just as Griffin's reaches residents of New York and Vermont. The site of a broadcasting tower or a printing press should not be controlling. Neither Miller Bros. nor Griffin made a special appeal to out-of-state residents.

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Because of the similarities, the Supreme Court's decision in Miller Bros. holding that Maryland had exceeded its authority is extremely persuasive precedent. Other cases which uphold a state's taxing power are distinguishable on their facts. In General Trading Co. v. Tax Commission, 322 U.S. 335 (1944), a corporation based in Minnesota sent traveling salesmen into Iowa to solicit orders for merchandise which the home office then sent to Iowa by common carrier or mail. Similarly, in Scripto v. Carson, 362 U.S. 207 (1960), a division of Scripto based in Atlanta solicited orders in Florida by using Florida residents as jobbers. Scripto assigned jobbers a specific territory and paid them on a commission basis. In Miller Bros. Justice Jackson distinguished General Trading on the ground that the subject corporation sent its sales representatives into the taxing state, a distinction we are inclined to follow in the case at hand.

Since Griffin has demonstrated a likelihood of success on the merits and on balance a need for interlocutory relief, a preliminary injunction will issue.

Accordingly, defendants' motion to dismiss is denied. Plaintiff's motion for a preliminary injunction is hereby granted. Defendants are temporarily enjoined from attempting to collect the tax assessed against plaintiff. Defendants are ordered to revoke the notice of assessment dated August 8, 1975 and hold further collection proceedings in abeyance pending a determination of this matter on the merits.

s/ James L. Oakes
United States Circuit Judge

s/ James S. Holden
United States District Judge

s/ Allen W. Coffrin
United States District Judge

October 20th, 1975.

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FOOTNOTES

1/ Defendants maintain that by reason of plaintiff's activities in New York State the plaintiff is a vendor as defined by section 1101(b) (8)(i) of the Tax Law. As such defendants claim Griffin is required to register, collect and remit sales taxes on sales of tangible personal property delivered in New York State, is personally liable for sales taxes not collected and remitted and must permit examination of its records. The duties of a vendor are found in sections 1105(a), 1105(c)(3), 1131(1), 1132(a), 1133(a), 1134 and 1135 of the Tax Law of the State of New York. For purposes of this opinion and order it is only necessary to note that defendants seek to impose collection of the New York Sales and Use Tax on plaintiff, a Vermont corporation, and plaintiff seeks to resist that effort. Accordingly, it is unnecessary to set forth the appropriate provisions of the statute in detail.

2/ The original notice was issued on May 14, 1975. Under section 1138(a) of the Sales and Use Tax Law, a party has 90 days to apply to the Tax Commission for a hearing on the assessment. This period would have run out on August 11, 1975, however, the Commission cancelled the May 14, 1975 notice and issued a superseding notice on August 8, 1975. The new notice shows an assessment of \$298,580.59. Thus plaintiff has not as yet lost his right to appeal to the Tax Commission, but the new assessment is larger by approximately \$80,000.00.

3/ Moody v. Flowers, 387 U.S. 97 (1967).

4/ Goosby v. Osser, 409 U.S. 512 (1973).

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5/ Idlewild Bon Voyage Liquor Corp. v. Epstein, 370
U. S. 713 (1962).

6/ § 1138. Determination of tax

(a) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors. Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same. After such hearing the tax commission shall give notice of its determination to the person against whom the tax is assessed. The determination of the tax commission shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless the amount of

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any tax sought to be reviewed, with penalties and interest thereof, if any, shall be first deposited with the tax commission and there shall be filed with the tax commission an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding, or at the option of the applicant such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application.

(b) If the tax commission believes that the collection of any tax will be jeopardized by delay it may determine the amount of such tax and assess the same, together with all interest and penalties provided by law, against any person liable therefor prior to the filing of his return and prior to the date when his return is required to be filed. The amount so determined shall become due and payable to the tax commission by the person against whom such a jeopardy assessment is made, as soon as notice thereof is given to him personally or be registered or certified mail. The provisions of subdivision (a) of this section shall apply to any such determination except to

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the extent that they may be inconsistent with the provisions of this subdivision. The tax commission may abate any jeopardy assessment if it finds that jeopardy does not exist. The collection of any jeopardy assessment may be stayed by filing with the tax commission a bond issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance as to solvency and responsibility, conditioned upon payment of the amount assessed and interest thereon, or any lesser amount to which such assessment may be reduced by the tax commission or by a proceeding under article seventy-eight of the civil practice law and rules as provided in subdivision (a), such payment to be made when the assessment or any such reduction thereof shall have become final and not subject to further review. If such a bond is filed and thereafter a proceeding under article seventy-eight is commenced as provided in subdivision (a), deposit of the taxes, penalties and interest assessed shall not be required as a condition precedent to the commencement of such proceeding. Where a jeopardy assessment is made, any property seized for the collection of the tax shall not be sold (1) until expiration of the time to apply for a hearing as provided in subdivision (a) of this section, and (2) if such application is timely filed, until the expiration of four months after the tax commission has given notice of its determination to the person against whom the assessment is made; provided, however, such property may be sold at any time if such person has failed to attend a hearing of which he has been duly notified, or if he consents to the sale, or if the tax

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of Vermont.

commission determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or if the property is perishable.

(c) A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto.

7/ Defendant argues that the Commission is competent to decide questions as to its own authority, but they have not cited any authority for this proposition.

8/ Declaratory relief was available in Spector; nevertheless the Supreme Court held that a federal court should retain jurisdiction of the suit in order to give appropriate equitable relief. A complicating factor in Spector, however, was the fact that there were undecided questions of state tax law which potentially could have disposed of the case in plaintiff's favor without reaching the constitutional claims. Since there was a declaratory judgment remedy where those questions could be decided, the Supreme Court instructed the district court to abstain while the parties litigated these matters in state court. Abstention would be improper in this case, however, because there is no indication that there are undecided questions under New York's tax law, and furthermore, the declaratory judgment remedy is not completely certain. Township of Hillsborough v. Cromwell, 326 U. S. 620, 629 (1946).

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9/ Plaintiff owns no realty and has no place of business in New York. It does not solicit business in New York through any sort of representative. Plaintiff does advertise in the media which serve the Albany-Schenectady-Troy region. This is the only metropolitan area within plaintiff's marketing area. Vermont based media do not cover all of plaintiff's Vermont marketing area so Griffin relies in part on New York newspapers, television channels, and radio stations whose coverage includes southwestern Vermont. In addition to advertising in New York media, Griffin also delivers merchandise to New York buyers in plaintiff's own trucks or occasionally by common carrier. Upon delivery, plaintiff's employees may assemble pieces of furniture. Occasionally employees return to "touch up" or repair minor defects. No charge is made for such services.

10/ Plaintiff, a Vermont corporation, has never been and is not now registered or qualified or authorized to do business in New York State. We need not decide whether, despite this fact, it has sufficient contacts with the State of New York to subject its person to the jurisdictional power of the New York courts. International Shoe Co. v. Washington, 326 U. S. 310 (1945). But it is clear that in order to avail itself of either the section 1138--article 78 proceeding or section 3001 declaratory judgment remedy Griffin would have to submit itself to the jurisdiction of the New York courts and thereby deprive itself of any possibility of asserting a claim that it was not subject to such jurisdiction. It should not be forced to litigate in New York at the risk of losing the opportunity to raise this issue. A remedy can hardly be said to be "plain, speedy and efficient" if the only way a party can take advantage thereof is to abandon a valid right which it possesses.

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11/ Exhibit D(2) to plaintiff's motion for a preliminary injunction is a news release forwarded to plaintiff by defendant Maloney. The news release concerns roadblocks which were set at three bridges leading from New Jersey to Staten Island to discover shipments of household appliances, furniture and other merchandise trucked into New York from New Jersey by merchants who had not collected the New York sales tax. Although the news release does not indicate that any seizures occurred, it would appear that a roadblock could lead to a seizure.

12/ In fact, upon oral argument counsel for the defendants indicated that the assessment against Griffin was brought about largely, if not entirely, as the result of New York competitors' complaints to the Tax Department.

NOTICE OF APPEAL.

(SAME TITLE).

SIRS:

PLEASE TAKE NOTICE that the defendants hereby appeal to the United States Supreme Court from the judgment and order of this Court entered October 20, 1975 in its entirety which denied defendants' motion to dismiss the action for lack of subject matter jurisdiction; and which temporarily enjoined the defendants from attempting to collect the tax assessed against the plaintiff and ordered the defendants to revoke the notice of assessment dated August 8, 1975, and hold further collection proceedings in abeyance pending a determination of the matter on the merits.

This appeal is taken pursuant to 28 U. S. C. §1253.

Dated: Albany, New York, November 7, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Office and P. O. Address
The Capitol
Albany, New York 12224
Tel. No. (518) 474-1394

By s/ Thomas P. Zolezzi
Thomas P. Zolezzi
Assistant Attorney General

Notice of Appeal.

TO:

HON. EDWARD J. TRUDELL
Clerk of the Court
United States District Court
For District of Vermont
Federal Building
P. O. Box 945
Burlington, Vermont 05401

WILLIAMS, WITTEN, CARTER
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Vermont Local Counsel for Defendants

**RELEVANT DOCKET ENTRIES IN U.S. DISTRICT
COURT FOR DISTRICT OF VERMONT.**

Dist/Office	YR.	Number	MO.	Day	Year	J	N/S
210-2	75	104	04	22	75	3	950
O R	23	\$	Other	Number	DEM.		
1			Decl. judgmt	-202			
			Prel. injunc.	1006			
				1007			
YR.	NUMBER						
75	104						

PLAINTIFFS

GRIFFIN, INC.

vs.

DEFENDANTS

TULLY, James H., Jr., A.
Bruce MANLEY, Milton
KOERNER, Francis X. MA-
LONEY, and John WILLEY

CAUSE

Plaintiff alleges New York State and local sales and
use taxes are in violation of the commerce, due
process, and equal protection clauses of the United
States Constitution.

ATTORNEYS

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115 Elm Street Bennington, VT 05201
442-8111

Thomas P. Zolezzi, Esq. Of Counsel:
Assistant Attorney General Theriault & Joslin, Esqs.
(Louis J. Lefkowitz, Esq. 87 Main Street
Attorney General-New York) Montpelier, VT 05602
The Capitol
Albany, NY 12224

**Relevant Docket Entries in U.S. District Court
for District of Vermont.**

FILING FEES PAID		
Date	Receipt Number	C. D. Number
4-22-75	#24091	4/15/75
11-11-75	#24458	5/20/75 #22
<input type="checkbox"/> Check here if case was filed in Forma Pauperis		
Statistical Cards		
Card	Date Mailed	
JS-5	May 5, 1975	
JS-6		

United States District Court Docket

DC-111 (Rev.
1/75)

Civ. 75-104, Griffin, Inc. vs. James H. Tully, Jr.,
et al

DATE 1975	NR.	Proceedings
Apr. 22	1	Filed Complaint.
" "		Issued Summons.
May 6	2	Filed Summons and Order for Notice and Proof of Delivery returned served.
May 12	3	Filed Appearance of Louis J. Lefkowitz, Esq. for Defts.
" "	4	Filed Notice of Cross Motion to Dismiss.
" "	5	Filed Memorandum of Law.
May 15	6	Filed Pltf's Request for Extension of Time.
" "		Upon Consideration of request for exten- sion of time to May 30, 1975 to file reply memorandum to defendants' motion to dismiss, in accordance with Rule 6(b) FRCP, it is ORDERED: Motion granted. By Direction of the Court.

Relevant Docket Entries in U.S. District Court
for District of Vermont.

May 30	7	Filed Motion for Preliminary Injunction.
" "	8	Filed Affidavit of Arthur E. Wickenden.
" "	9	Filed Affidavit of Robert J. Dimke.
" "	10	Filed Affidavit of John Lonergan.
" "	11	Filed Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, and in support of Plaintiff's Motion for Preliminary Injunction.
June 13	12	Filed Defts' Memorandum of Law in opposition to Pltf's Motion for a Preliminary Injunction and in Reply to Pltf's Memorandum in Opposition to Defts' Motion to Dismiss.
June 27		In Court before Judge Holden, Paul Wickes, Esq., and Harvey Carter, Esq. for Plaintiff. Peter Joslin, Esq., and Thomas P. Zolezzi, Esq., for Defendants. Hearing on Defendants' notice of cross motion to dismiss.
" "		Statements made to Court by Mr. Zolezzi in support of Defendants' motion to dismiss; objected to by Mr. Wickes for Plaintiff.
" "		Ordered: Motion to dismiss denied without prejudice and motion may be renewed to Three Judge Court, which will be requested to be convened under T.18 USC Sec. 2284; Case continued to July 11, 1975 at which time parties to have stipulation of agreed facts ready.
July 8	13	Filed Stipulation.
July 14	14	Filed Designation of Judges. Mailed copy to attorneys.
Aug. 1		In Court before Three Judge Court. R. Paul Wickes and James Burger, Esqs.

Relevant Docket Entries in U.S. District Court
for District of Vermont.

		for Pltf.; Thomas P. Zolezzi, Esq. for Defts.
Aug. 1		Hearing on Defts' Motion to Dismiss.
" "		Statements made to Court by Mr. Zolezzi in support of Defts' motion to dismiss; followed by Mr. Wickes in opposition.
" "		Defts. requested to notify three-judge Court by Monday next if Tax Dept. of New York will postpone its assessment of taxes due.
" "		Taken under advisement.
Aug. 6	15	Filed cancellation of NY State Tax assessment and statement of reissue.
Aug. 15	16	Filed letter dated August 14, 1975 from plaintiff's counsel.
Oct. 21	17	Filed Opinion 3 Judge Court---Defendant's Motion to Dismiss is denied. Pltf's Motion for a Preliminary Injunction is hereby granted. Defts. are temporarily enjoined from attempting to collect the tax assessed against Pltf. Defts. are ordered to revoke the notice of assessment dated 8-8-75 and hold further collection proceedings in abeyance pending a determination of this matter on the merits. (Mailed copies to Attny.)
Nov. 10	18	Filed Defts' Notice of Appeal. Mailed copy to Williams, Witten, Carter & Wickes, Esqs., Thomas P. Zolezzi, Esq., Theriault & Joslin, Esqs., Court Reporter, Judges Oakes, Holden & Coffrin & Clerk, U. S. Supreme Court.
" "		Mailed Plan and Forms C & D to Defts' atty.
Dec. 29		Mailed Record on Appeal to Clerk, U. S. Supreme Court, Washington, D.C.

Relevant Docket Entries in U.S. District Court
for District of Vermont.

CIVIL DOCKET CONTINUATION SHEET

Plaintiff	Defendant
Griffin, Inc.	James H. Tully, Jr. et al

Docket No. 75-104Page ____ of ____ Pages

DATE	NR.	Proceedings
1976 Mar. 1	19	Filed Certified copy of Supreme Court Order noting probable jurisdiction.

JAN 12 1976

MICHAEL RODRIGUEZ, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-831

J. H. TULLY, Jr., ET. AL., *Appellant*

vs.

GRIFFIN, INC. *Appellee*

APPELLEE'S MOTION TO DISMISS OR AFFIRM

AND

BRIEF IN SUPPORT THEREOF

JOHN H. WILLIAMS, II
Attorney for the Appellee

115 Elm Street
Bennington, Vermont 05201

R. PAUL WICKES

WILLIAMS & WICKES
115 Elm Street
Bennington, Vermont 05201

Of Counsel

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IN THE
Supreme Court of the United States

October Term, 1975

No. 75-831

J. H. TULLY, JR., ET. AL., *Appellant*

vs.

GRIFFIN, INC., *Appellee*

MOTION TO DISMISS OR AFFIRM

COMES NOW Griffin, Inc., Appellee herein, and moves the Court to dismiss this appeal, pursuant to Rule 16.1(a) of the rules of this Court, on the grounds that the appeal is not within the jurisdiction of this Court, because of the failure of appellants to conform to Rules 15.1(f) and 15.1(g);

And in the alternative, appellee moves the Court to affirm the order of the district court, pursuant to Rule 16.1(c) of the rules of this Court, on the grounds that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

Appellee (plaintiff below), a Vermont corporation, brought this action to challenge appellants' contention that appellee is required to collect New York sales and use taxes on certain goods sold by it to residents of New York at appellee's place of business in Arlington, Vermont. The complaint, which sought declaratory and permanent injunctive relief, alleged that the imposition of such taxes on appellee would violate the Commerce, Due Process and Equal Protection Clauses of the United States Constitution. Initially, no preliminary relief was requested.

Appellants moved to dismiss the complaint, on the grounds that the district court had no jurisdiction because of 28 U.S.C. 1341.¹ Five days after moving to dismiss, appellants issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due," in the amount of \$218,085.37. By its terms this notice provided that, unless a request for hearing was filed with the State Tax Commission within ninety days, the determination would become final.

In order to stay the running of that appeal period, appellee then moved for a preliminary injunction. A consolidated hearing was held before a three-judge court on August 1, 1975, on appellants' motion to dismiss and appellee's motion for preliminary relief. Since the tax appeal period would have expired within several days of that hearing, appellants, at the request of the court,²

¹ 28 U.S.C. § 1341: The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

² "JUDGE COFFRIN: Could they withdraw the assessment with the understanding that they could later file the same assessment, or a later assessment or another assessment and start another ninety day period couldn't they?" Transcript of hearing, August 1, 1975, p. 39.

cancelled the assessment and issued a replacement in the amount of \$298,580.59 on August 8, 1975.³

By order of October 20, 1975, the district court denied the motion to dismiss, enjoined any attempts to collect the tax, and ordered the revocation of the August 8, 1975 assessment notice. It is this order that appellants seek to have reviewed by the Supreme Court.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE THIS COURT IS WITHOUT JURISDICTION, AS A RESULT OF THE FAILURE OF APPELLANTS TO COMPLY WITH RULES 15.1(f) and 15.1(g) OF THE RULES OF THIS COURT.

Rule 15 of the rules of this Court sets forth the requisites for the statement as to jurisdiction required as part of the Rule 13 procedure for docketing cases. Subsection 1(f) of Rule 15 requires, in the case of an appeal from a federal court, a "...statement of the reasons why the questions presented are so substantial as to require plenary consideration...." No such statement appears in the Jurisdictional Statement for Appellants submitted herein. Subsection 1(g) of Rule 15 requires, in the case of an appeal from an order granting a preliminary injunction, a "...showing of the matters in which it is contended that the court has abused its discretion by such action." Appellants' jurisdictional statement contains no such showing.

In the absence of a claim of abuse of discretion, there is nothing for this Court to do in this case, for it has long been settled that the only inquiry in an appeal from an interlocutory injunction is whether the court below abused its discretion. *U.S. v. Corrick*, 298 U.S. 435, 437 (1936).

The appeal should be dismissed, because appellants have failed to comply with the requirements for conferring jurisdiction on this court.

³Opinion of the district court, October 20, 1975, fn. 2, Jurisdictional Statement for Appellants, p. 32 (hereafter cited as *Opinion*.)

II. THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED, BECAUSE IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Although it is the fact that the district court issued a preliminary injunction which permits an appeal at this time, appellants' jurisdictional statement is addressed not to the injunction, but to the denial of their motion to dismiss. Indeed, if dismissal is not required, there can be no doubt about the propriety of a temporary injunction designed to preserve for appellee important rights during the litigation, especially when that preservation can be accomplished at no cost to appellants.

28 U.S.C. § 1341 does not absolutely forbid the grant of injunctions by federal courts in state tax cases. Rather, it requires an initial inquiry into the adequacy of the remedies available to challenge the exaction in the courts of the taxing state to determine whether the particular party in question has a remedy which is not "unduly burdensome." *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952).

In this case, the district court, after hearing and extensive memoranda of law (including two on behalf of appellants), concluded that the remedies available to appellee in New York suffered from such infirmities as to take the case out of the prohibition of Section 1341. Those infirmities included the following:

1. The apparent lack of authority for the State Tax Commission to consider appellee's constitutional claims in the administrative hearing process, even aside from the dubious proposition of arguing such claims before the officials who are seeking to impose the tax, *Opinion*, p. 23;

2. The requirement, in order to obtain judicial review of a determination by the tax commission, that appellee pay the tax or post a bond in an amount greater than

appellee's total assets, *Opinion*, p. 24; cf. *Denton v. City of Carrollton*, 235 F. 2d 481 (5th Cir. 1956);

3. The requirement, as a precondition to the administrative review process, that appellee submit to an audit by an authority whose jurisdiction it contests, *Opinion*, p. 23; cf. *United States Steel Corp. v. Multistate Tax Commission*, 367 F. Supp. 107 (S.D.N.Y. 1973);

4. Serious doubt as to the availability of a declaratory judgment proceeding in the state courts as an alternative to the administrative review process, *Opinion*, pp. 25-29; cf. *Township of Hillsborough v. Cromwell*, 326 U.S. 620 (1946); *Spector Motor Co. v. McLaughlin*, 323 U.S. 101 (1944);

5. The apparent inability of New York courts to grant interlocutory relief, even assuming the availability of a declaratory judgment proceeding, *Opinion*, p. 28;

6. The possibility that, in utilizing any of the state remedies, appellee, whose contacts with New York State the district court found to be minimal, would waive any claim it had to be free of jurisdiction in New York, *Opinion*, fn. 10, p. 35; and,

7. The inherent difficulties in making appellee, a small corporation whose contacts with New York the district court found to be minimal, litigate in an unfamiliar forum, *Opinion*, p. 27.

The district court was well within the permissible boundaries of its discretion in denying the motion to dismiss, in view of its analysis of the relationship between appellee and the procedural avenues made available by New York.

The district court was likewise well within its permissible discretion in granting a preliminary injunction. What the court viewed as "extremely persuasive precedent" existed indicating a substantial likelihood that appellee would prevail on the merits. *Opinion*, p. 31. Further, the possibility that appellee would forever lose its right to challenge the amount of the

assessment if its constitutional challenge should fail constituted the plain spectre of irreparable injury to appellee. Finally, there is no hardship to appellant resulting from the injunction. This injunction does not interfere with a whole statutory scheme, but merely preserves the *status quo* as between these litigants during the pendency of the lawsuit.

CONCLUSION

The appeal should be dismissed, for the failure of appellants to conform to the requirements of Rule 15, or affirmed because there is no substantial question about the propriety of the actions of the district court.

Dated at Bennington, Vermont, January 9, 1976.

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(G-43)

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1975

No. 75-831

GRIFFIN, INC.,

Appellee,

against

JAMES H. TULLY, JR., A. BRUCE MANLEY,
MILTON KOERNER, FRANCIS X. MALONEY,
and JOHN WILLEY,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

BRIEF FOR APPELLANTS

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IN THE
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GRIFFIN, INC.,

Appellee,

against

JAMES H. TULLY, JR., A. BRUCE MANLEY,
MILTON KOERNER, FRANCIS X. MALONEY
and JOHN WILLEY,

Appellants.

**On Appeal from the United States District
Court for the District of Vermont**

BRIEF FOR APPELLANTS

Opinion Below

The opinion and order of the three-judge District Court filed October 20, 1975 is set out on pages 41-61 of the Appendix. It is reported at 404 F. Supp. 738.

Jurisdiction

The opinion and order of the three-judge District Court was entered on October 20, 1975. The notice of appeal was filed in the office of the Clerk of the United States District Court for the District of Vermont on November 10, 1975. The

case was docketed December 11, 1975 and on February 23, 1976 this Court noted probable jurisdiction. The jurisdiction of this Court rests upon 28 United States Code § 1253

Statute of the United States Involved

Title 28 U.S.C. § 1341 (Popularly referred to as the Johnson Act):

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Statutes of the State of New York

New York Tax Law, §§ 1101(b)(5), 1101(b)(8)(i), 1105(a), 1105(c)(3), 1131(1), 1132(a), 1133(a), 1134, 1135, 1138 and 1140.

New York Civil Practice Law and Rules, §§ 3001, 6301 and 6311.

These statutes of New York are set forth as Appendix A to this brief.

Question Presented

Was the Court below in error when it determined that the two alternate methods of relief open to appellee for reviewing the applicability of the New York State Tax Law to its business provided for under New York Law, *i.e.*, *A.* Administrative and judicial review of the Tax Commission's decision as provided for by Article 78 of the New York Civil Practice Law and Rules and *B.* An action for a declaratory judgment in the courts of the State of New York, were not plain, speedy, or adequate remedies for the appellee within the meaning and intent of 28 U.S.C. § 1341?

The three-judge District Court below held that neither is plain, speedy and efficient within the meaning of 28 U.S.C. § 1341.

Statement of the Case

The appellee is a Vermont corporation which has a place of business in Arlington, Vermont. It is engaged in the retail sale of furniture and gift shop items. A substantial portion of the appellee's sales are made to persons who are not residents of Vermont. Appellee's store is located approximately 25 miles from the Massachusetts-Vermont border and approximately 6 miles from the New York-Vermont border. A large portion of these interstate sales are to residents of New York State. The New York State sales tend to be concentrated to persons in the Albany-Schenectady-Troy area which is fairly close to New York border, although sales are made on occasion to other parts of the State of New York.

Some of the articles purchased from the appellee by New York State residents are carried away from the store by the residents and some articles (particularly when furniture is involved) are delivered to New York in trucks owned by the appellee. Such deliveries are made by employees of the appellee and since the furniture sometimes requires assembling or setting up, such as the attachment of legs to a table, which assembling is done by employees of the appellee, it makes it impractical to use common carriers to deliver furniture.

The appellee's advertising reaches into New York State. It advertises through advertising media located in the Albany-Schenectady-Troy area of New York and includes radio advertising, television advertising, newspaper advertising and roadside sign located on a New York highway. The facilities for the radio and television stations are located entirely within New York State. Appellee's newspaper advertising is in a weekly joint television listing section of two newspapers

which are published in Albany, New York and which are circulated primarily in the Albany-Schenectady-Troy area of New York.

The appellee also sends repairmen into New York State to service complaints.

The New York State sales tax is imposed on the receipts of every retail sale of tangible personal property. A sale is defined in section 1101(b)(5) of the New York Tax Law as "any transfer of title or possession, or both *** in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service *** for a consideration or any agreement therefor."

A vendor is personally liable for the collection and remittance to the New York State Department of Taxation and Finance of the sales tax, but the tax itself is not on the vendor. The sales tax is on the purchaser of the merchandise.

Based upon the contacts that the appellee has with New York State and on the admitted fact that employees of the Appellee deliver merchandise in appellee's own truck and that the appellee transfers possession of the merchandise in New York State, the appellants, to determine if the appellee is a vendor as defined by section 1101(b)(8)(i) of the Tax Law of the State of New York and to determine if the appellee is subject to the responsibilities of a vendor as set forth in the provisions of section 1105(a), 1105(c)(3), 1131(1), 1132(a), 1133(a), 1134 and 1135 of the Tax Law of the State of New York (Appendix A) in regard to the collection and remittance of sales tax to the State of New York on those sales of tangible personal property delivered by it into New York State, sent a tax examiner to the appellee's place of business in Vermont to examine the appellee's books and records to ascertain if any sales tax was owed by the appellee to the State of New York. It should be noted that the State of New York is not seeking to impose sales tax on those goods sold to New York residents at

the appellee's place of business in Vermont and delivered to the purchasers in Vermont. The State of New York is seeking to have the appellee collect and remit to the State of New York the sales tax only on those goods which are delivered by the appellee into the State of New York. The examiner was denied access to the appellee's records and books.

On April 23, 1975, the appellants again went to the appellee's place of business to conduct an audit and appellee again refused to permit an audit and served the tax examiner with the complaint which commenced the present lawsuit.

The appellee brought an action in the United States District Court for the District of Vermont seeking a declaratory judgment that any assessment, levy, or collection against it would violate the Commerce, Due Process and Equal Protection clauses of the Constitution. The appellee also sought injunctive relief.

The appellants moved to dismiss on the grounds that "the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State" (28 U.S.C. § 1341).

A three-judge court was convened and a hearing was held on August 1, 1975.

The three-judge court by judgment and order dated October 20, 1975, denied the appellants' motion to dismiss and granted the appellees a temporary injunction enjoining the appellants from attempting to collect the tax assessed against the appellee and ordered the appellants to revoke the notice of assessment dated August 8, 1975 and hold further collection proceedings in abeyance pending a determination of the matter on the merits.

Appellants appealed to this court from that judgment and order pursuant to the provisions of 28 U.S.C. § 1253.

This court noted probable jurisdiction on February 23, 1976.

ARGUMENT

POINT I

Since the appellee has a plain, speedy and efficient remedy in the Courts of the State of New York, the Court below erred in not dismissing the action for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1341.

The appellee in its complaint sought to have the appellants enjoined in the enforcement and execution of various provisions of the New York State Tax Law.

However, Title 28 U.S.C. 1341 provides:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

This restriction upon the power of the United States District courts in enjoining the enforcement of state tax laws has been interpreted on numerous occasions by this Court. In *Matthews v. Rogers*, 284 U.S. 521 (1932), this Court said:

"The scrupulous regard for the rightful independence of state governments which should be at all times actuate the federal courts and a proper reluctance to interfere by injunction with the fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, the Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the Courts, of the United States. If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts, from which the complaint may be brought to this Court for review if a federal questions be involved."

In *Great Lakes Co. v. Huffman*, 319 U.S. 293 (1943) this Court held:

"* * * it is the Court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes." *Id.* at 300-301 (emphasis supplied).

Accordingly, although the District Court's exercise of discretion in actions seeking equitable relief is undeniably broad, this Court in *Great Lakes Co. v. Huffman*, *supra*, made it abundantly clear that "it is the Court's duty to withhold such relief" under the Johnson Act, *Great Lakes Co. v. Huffman*, 319 U.S. 293, 300. As the Court in *City of Houston v. Standard-Triumph Motor Company*, 347 F. 2d 194 (5th Cir., 1965) cert. den. 382 U.S. 974 (1966) quite properly observed:

"Certainly, after emphasizing the pre-Johnson Act equitable limitations congressionally approved and strengthened by that enactment, it is inconceivable that the Supreme Court intended to allow any discretion to grant declaratory relief where adequate state remedies were available." *Id.* at 199.

Accordingly, the propriety of the consideration of the Court below should have revolved around the question of whether or not the legal remedies afforded to the appellee by New York State are plain, speedy and adequate.

It is submitted that the legal remedies provided by New York State are plain, speedy and adequate.

The State of New York provides the appellee with two methods of relief: A. An administrative hearing before the State Tax Commission at which testimony would be taken and

evidence received to support the position of the appellee. If the determination of the State Tax Commission is adverse to the appellee it may bring a proceeding for judicial review pursuant to Article 78 of the New York Civil Practice Law and Rules; B. The appellee has a second mode of relief available in the New York State Courts by an action for declaratory judgment.

A. Administrative Remedies

New York Tax Law, § 1138, provides for a state administrative review by the State Tax Commission. A hearing is provided before the State Tax Commission and judicial review of the determination of the State Tax Commission is specifically authorized by Tax Law, Article 28, by way of a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules.

The Federal Courts have repeatedly found the available state tax remedies by way of Article 78 review to be adequate. See *Amer. Commuters Ass'n. v. Levitt*, 279 F. Supp. 40 (S.D.N.Y., 1967), *affd.* 405 F. 2d 1148 (2d Cir., 1969); *Hickman v. Wujick*, 333 F. Supp. 1221 (E.D.N.Y., 1971); *Collier Advertising Service v. City of New York*, 32 F. Supp. 870 (S.D.N.Y., 1940). As the Court in *Collier* noted at 872:

"Art. 78 *** provides for review in the nature of the old time certiorari proceeding, for a stay *** for a raising of constitutional and jurisdictional questions *** [and] for restitution ***"

It should be noted that the appellee in the present case has not only exhausted its administrative remedies but it has not even begun to pursue its administrative remedies.

The appellee contended in the Court below that it should not have to use the administrative remedies available to it because the remedies are not plain, speedy or efficient. This conclusion is based on the argument that the appellee will

have to post a bond or pay the assessment before it can commence a proceeding under Article 78 of the Civil Practice Law and Rules to review a decision of the New York State Tax Commission that it is subject to taxes.

The flaw in this reasoning is that the appellee is presupposing that it will not be successful at a formal hearing held before the New York State Commission.

The New York State Tax Commission has the obligation to hold formal hearings when tax assessment is challenged and evaluate all of the evidence submitted at the hearing. It is not required that the tax be paid or a bond posted prior to receiving a formal administrative hearing. The determination of the State Tax Commission must be based upon the evidence presented. It may not be an arbitrary or capricious determination, *Matter of Pell v. Bd. of Education*, 34 N Y 2d 222 (1974). The appellee will be given a hearing at which it may present any and all evidence to support its position that it is exempt from taxation by New York State. If it sustains its position that it is exempt from taxation by New York State, the New York State Tax Commission will grant it the exemption and thus end the entire proceeding. The whole matter could be resolved at no more expense than it would cost to appear at a hearing and produce evidence to support its position. The only time that the appellee must post a bond is if the New York State Tax Commission rendered a determination adverse to the appellee and the appellee commenced an Article 78 proceeding for judicial review of the determination of the State Tax Commission.

In the event that the appellee pays the tax and it is decided by the State Tax Commission that the appellee is exempt from taxation, the appellee's payment would be refunded with interest at the rate of six percent *per annum* upon such payment as is authorized by New York Tax Law, § 1139(d). See *Matter of Brodsky v. Murphy*, 25 N Y 2d 518, 522 (1971).

It is submitted that the appellee has a plain, speedy and adequate remedy under the administrative-judicial review remedy provided by the laws of the State of New York.

B. Action for Declaratory Judgment in New York State Courts.

(1)

New York Civil Practice Law and Rules, § 3001, provides for actions for declaratory judgment in the New York State Supreme Court for decision as to the applicability or constitutionality of the Tax Laws of the State of New York. The Courts of New York have held in respect to tax statutes, that "an action for a declaratory judgment may be maintained, despite the provisions of a taxing statute which provides that the method of judicial review presented therein shall be exclusive, where the jurisdiction of the taxing authorities is challenged on the ground that the statute is unconstitutional or that the statute by its own terms does not apply in a given case". In the *Matter of First National City Bank v. City of New York Finance Administration*, 36 N Y 2d 87 (1975); *Richfield Oil Corporation v. City of Syracuse*, 287 N.Y. 234, 239 (1942); see also *Dun & Bradstreet, Inc. v. City of New York*, 276 N.Y. 198, 206 (1937); *Socony-Vacuum Oil Co. v. City of New York*, 247 App. Div. 163 (1st Dept., 1936), *affd.* 272 N.Y. 668 (1936); *Yonkers Raceway, Inc. v. City of Yonkers*, 66 Misc 2d 589, 593 (Sup. Ct., West. Co., 1971). The above cases permitting declaratory judgment actions in cases of municipal taxation have been held applicable to state taxation as well. *Hudson Transit Lines, Inc. v. Bragalini*, 11 Misc 2d 1094, 1096-7 (Sup. Ct., N.Y. Co., 1958) see also *Peters v. Tax Commission*, 18 A D 2d 880 (1st Dept., 1963), *affd.* 13 N Y 2d 1148 (1964).

The New York State Court of Appeals in the most recent case on the subject, *Slater v. Gallman, et al.*, N Y 2d (decided November 20, 1975) held:

"To be sure, a tax assessment may be reviewed in a manner other than that provided by statute where the constitutionality of the statute is challenged or a claim is made that the statute by its own terms does not apply (*First Nat. Bank v. City of New York*, 36 NY2d 87, 92-93; *Richfield Oil Corp. v. City of Syracuse*, 287 NY 234, 239) and where the assessment is wholly fictitious and is made without any factual basis solely to extend a period of limitations (*Brown v. New York State Tax Comm.*, 199 Misc 349, 353-354, *affd* 279 App Div 837, *affd* 304 NY 651)."

In the recent case of *Hospital Television Systems, Inc. v. New York State Tax Commission*, 41 A D 2d 576 (3d Dept., 1973) *affd.* 36 N Y 2d 746, a case which challenged a decision of the State Tax Commission and which involved the question of the constitutionality of the application of section 1138 of the New York Tax Law (the same section of the Tax Law which the appellee contends is being unconstitutionally applied to it), the New York State Appellate Division (Third Department) said:

"Section 1140 of such tax law states that the remedies provided by section 1138 are exclusive. It is well recognized that when a taxing authority jurisdiction is challenged on the ground that the statute is unconstitutional or inapplicable, resort need not be had to the method of review prescribed in the taxing statute (*Richfield Oil Corp. v. City of Syracuse*, 287 N.Y. 234, 239.)"

The New York State Court of Appeals in the recent case of *First National City Bank v. City of New York*, 36 N Y 2d 87 (1975), said (at page 92):

"When a tax statute, however, is alleged to be unconstitutional, by its terms or application, or where the statute is attacked as wholly inapplicable, it may be challenged in judicial proceedings other than those prescribed by the statute as 'exclusive'; the invalidity or total inapplicability affects the entire statute, including the limitations and restrictions on the remedy provided

in it (see *Richfield Oil Corp. v. City of Syracuse*, 287 N.Y. 234, 239; *Dun & Bradstreet v. City of New York*, 276 N.Y. 198, 206-207; *Secony-Vacuum Oil Co. v. City of New York*, 247 App. Div. 163, 166-167, affd. 272 N.Y. 668)."

The Federal courts have also held that the action for declaratory judgment in the State of New York is a plain, adequate and speedy remedy.

In the recent decision of the United States District Court, *Ammex Warehouse Co., Inc., et al. v. Gallman, et al.*, (unreported, N.D.N.Y. 72 Civ. 306; 72 Civ. 310), affd. 414 U.S. 802 (1973), in which the plaintiffs brought an action in the Federal Court to have New York State Tax Law, § 1138 declared unconstitutional as applied to plaintiffs, the three-judge Court in a memorandum decision by Judge KAUFMAN held:

"****we are of the view that at this juncture we are without jurisdiction to consider this claim. Congress has provided that 'The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.' 28 U.S.C. § 1341. We believe such a remedy is available in the New York courts. N.Y. Civil Practice Law and Rules § 3001 (McKinney's 1970) provides that the state supreme court may issue declaratory judgments. There is ample authority that a declaratory judgment action may be employed to challenge imposition of a tax. See, e.g., *Richfield Oil Corp. v. City of Syracuse*, 287 N.Y. 234 (1942); *Hudson Transit Lines, Inc. v. Bragalini*, 172 N.Y.S. 2d 423 (Sup. Ct. 1958). Accordingly, Ammex may present its arguments in the state supreme court and seek a declaratory judgment from that court that application of these taxes to Ammex's export operations is unconstitutional. The parties could seek ultimate review in the United States Supreme Court. 28 U.S.C. § 1257. We find unpersuasive Ammex's contention that the apparent inability of the state supreme court to issue an injunctive order barring collection by the State Tax Commission

pending a final decision renders a declaratory judgment action inadequate under 28 U.S.C. § 1341."

For the Court's convenience, a copy of the district court's memorandum decision in the *Ammex* case, is attached as Appendix B to this brief. See also the case of *West Publishing Company v. McColgan*, 138 F. 2d 320 (C.C.A. 9th Cir., 1943), where plaintiff who was not qualified to do business in California and who had no property in California, brought an action for declaratory judgment in the Federal court to declare California's corporation income tax void as denying due process of law and imposing a burden upon interstate commerce. The Federal court held that the action was not within the jurisdiction of the Federal District Court where the California law provided an adequate remedy in its State Courts.

(2)

Although the appellee has a right to a declaratory judgment in the courts of the State of New York, it inferred in the Court below that an action for a declaratory judgment in the State courts is not adequate because the appellee could not get injunctive relief pending the final determination by New York's highest court, the Court of Appeals.

Under the provisions of section 6301 and 6311 of the New York Civil Practice Law and Rules, the appellee could apply for, and if circumstances warrant, obtain a preliminary injunction against the appellants to enjoin the appellants from collecting taxes pending a determination of the case by the State courts.

Section 6301 of the New York Civil Practice Law and Rules provides as follows:

"Grounds for preliminary injunction and temporary restraining order. A preliminary injunction may be granted in any action where it appears that the defendant

threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed, or continued during the pendency of the action, would produce injury to the plaintiff."

Section 6311 of the New York Civil Practice Law and Rules provides as follows:

"§ 6311. Preliminary injunction.

"1. A preliminary injunction may be granted only upon notice to the defendant. Notice of the motion may be served with the summons or at any time thereafter and prior to judgment. A preliminary injunction to restrain a public officer, board or municipal corporation of the state from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed.

"2. Notice of motion for a preliminary injunction to restrain state officers or boards of state officers under the provisions of this section must be upon notice served upon the defendant or respondent, state officers or board of state officers and must be served upon the attorney general by delivery of such notice to an assistant attorney general at an office of the attorney general in the county in which venue of the action is designated or if there is no office of the attorney general in such county, at the office of the attorney general nearest such county."

A preliminary injunction may be obtained against State officials as long as the officials are put on notice that the appellee is making a motion for a preliminary injunction or temporary restraining order (cf., *McArdle v. Comm. of Investigation*, 41 A D 2d 401 [3d Dept., 1973]).

It is therefore possible for the appellee to apply for and if circumstances warrant obtain the injunctive relief that it seeks in the courts of the State of New York.

The dual remedies of a declaratory judgment action and administrative agency review have been held to constitute an adequate review for purpose of invoking the dictates of the Johnson Act (28 U.S.C. 1341). *American Commuter Ass'n. v. Levin*, 279 F. Supp. 40 (S.D.N.Y., 1967), affd. 405 F. 2d 1148 (2d Cir., 1969); *Hickman v. Wujick*, 333 F. Supp. 1221 (E.D.N.Y., 1971); *Collier Advertising v. City of New York*, 32 F. Supp. 870 (S.D.N.Y., 1940); See also *Jones v. Township of North Bergen*, 331 F. Supp. 1281 (D.C.N.J., 1971); *Zenith Dredge Company v. Corning*, 231 F. Supp. 584, 588-589 (W.D. Wisc., 1964); *Gray v. Morgan*, 251 F. Supp. 316 (W.D. Wisc., 1966) affd. 371 F. 2d 172 (7th Cir., 1966), cert. den. 386 U.S. 1033 (1967); *Abernathy v. Carpenter*, 208 F. Supp. 793 (W.D. Mo., 1962), affd. 373 U.S. 241 (1963); *Carson v. City of Fort Lauderdale*, 293 F. 2d 337 (5th Cir., 1961); *Aronoff v. Franchise Tax Board*, 348 F. 2d 9 (9th Cir., 1965); *City of Houston v. Standard-Triumph Motor Company*, 347 F. 2d 194 (5th Cir., 1965), cert. den. 383 U.S. 974 (1966); *Bussie v. Long*, 254 F. Supp. 797 (E.D. La., 1966); *Carbonneau Industries, Inc. v. City of Grand Rapids*, 198 F. Supp. 627 (W.D. Mich., 1961).*

It is clear that 28 U.S.C. § 1341 is applicable to the present case since the appellee has a plain, speedy and efficient remedy before the New York State Tax Commission and in the New York State courts.

It appears that the appellee is contending that a better remedy would be available in the Federal courts. It is submitted that neither the judicial decisions nor section 1341 requires that the State remedy be the best remedy available or

* Indeed several of these cited cases have held that one of the two remedies (available in New York) would suffice to fall within the confines of the Johnson Act requirement of adequate state remedies, e.g., *Abernathy v. Carpenter*, *supra*.

even equal to or better than the remedy which might be available in the Federal courts. Section 1341 merely requires that the State remedy be plain, speedy and efficient. *Bland v. McHann*, 463 F. 2d 21, 29 (5th Cir., 1972), cert. den. 410 U.S. 966 (1973); *Miller v. Bauer*, 517 F. 2d 27 (7th Cir., 1975).

Since the appellee has the same plain, speedy and efficient remedies in the courts of the State of New York that it would have in the Federal courts, and in view of the provisions of 28 United States Code § 1341, the Court below erred in not dismissing the complaint for lack of subject matter jurisdiction and it erred in granting the preliminary injunction to the appellee against the appellants.

It should be noted that the appellee, if there is an adverse decision in the courts of the State of New York, may petition this Court to review any decision of the Court of Appeals of the State of New York which appellee might feel wrongfully interpreted its constitutional rights with regard to the applicability of the New York State Tax Law to its business.

It is submitted that the courts of the State of New York are without doubt competent to decide federal questions raised before them and have the duty to do so. *Robb v. Connolly*, 111 U.S. 624; *Defiance Water Co. v. Defiance*, 191 U.S. 184 (1903). The Court below should have deferred the interpretation placed on a New York State Tax statute to the Courts of the State of New York. Cf., *United Airlines v. Makin*, 410 U.S. 623, 629 (1973); *Scripto, Inc. v. Carson*, 362 U.S. 207, 210 (1960); *General Trading Co. v. State Tax Commission*, 322 U.S. 335, 337 (1944).

POINT II

The admitted activities of the appellee establish sufficient local contact and sales with and within the State of New York to make the appellee amenable to suit in Courts of the State of New York.

It is submitted that the Court below erred when it held that the appellee's contacts with New York were minimal.

For the sole purpose of expediting proceedings in the District Court with respect to the appellants' motion to dismiss the Complaint and the appellee's motion for a preliminary injunction a stipulation was entered into between the attorneys for the appellants and appellee. It was entered into without prejudice to the right of either party to prove different or additional facts at later stages of the action.

In that stipulation (pages 24-30 of Appendix) the appellee, whose store is only six miles from the New York border, conceded that it does deliver merchandise into New York State in trucks owned by the appellee and that it sends repairmen into New York to service merchandise it sells. The appellee therein admitted that it advertises on radio and television stations located in New York State and in newspapers published in New York. For the purposes of the stipulation, the appellee would not declare how often it delivers into New York State, or whether it was done on a regular basis. Nor would the appellee disclose a dollar amount of business it does delivering into New York State. Based on this alone, the Court below was in error in prejudging the merits of the case and without further proof finding that the appellee's contacts with New York State were minimal.

It is submitted that the facts that the appellee delivers merchandise into New York State in its own trucks; sends repairmen into New York State to repair the merchandise; contracts with radio and television stations located wholly and solely

within New York State to carry its advertising; and contracts with newspapers published solely in New York State to carry its advertising on a weekly basis (which advertising directly solicits New York residents by the fact that the map in the advertising specifically sets forth a map from the Albany, Troy, Cambridge areas of New York to the appellee's place of business in Vermont) (page 30 of Appendix), constitute local activity by the appellee with and within New York State for sales tax purposes, *McGoldrick v. Berwind-White Co.*, 309 U.S. 33 (1939). They also constitute the doing of business in the State of New York which would give the courts of New York State jurisdiction over appellee for all actions and proceedings which it would chose to bring against the New York State Tax Commission.

It is these continuous and systematic activities of the appellee which give the appellee "presence" within the State of New York. The appellee, by its activities in the State of New York, is enjoying the benefits and protection of the laws of the State of New York.

If the appellee is going to continue to conduct business in the State of New York, it must submit to the obligations which arise out of or are connected with its activities within the State. *International Shoe Co. v. Washington*, 326 U.S. 310. Such an obligation would be to collect a sales tax on those goods and merchandise which it delivers into the State of New York. Even though the appellee claims it is engaged in interstate commerce, it is required to collect and pay sales taxes to the State from which it receives vast benefits and privileges, *cf. Northwestern Cement Co. v. Minnesota*, 358 U.S. 450. It is submitted that the appellee's activities which establish the "presence" within the State of New York subject it to taxation by the State. If the appellee feels that it should be exempt from taxation by the state, it has adequate remedies in the courts of the taxing state to assert its exemption (*cf. International Shoe Co. v. Washington, supra*).

As Mr. Justice Black said in his concurring opinion in *International Shoe Co. v. Washington*:

"Certainly a State, at the very least, has power to tax and sue those dealing with its citizens within its boundaries, as we have held before. *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313."

CONCLUSION

Appellants pray that the order and judgment of the Three-Judge Federal Court below, which denied appellants' motion to dismiss for lack of jurisdiction be reversed and that the complaint be dismissed.

Dated: March 31, 1976

Respectfully submitted,

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APPENDIX A

Statutes of the State of New York

New York Tax Law, § 1101(b):

"(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

New York Tax Law, § 1101(b)(8):

"(8) Vendor. (i) The term "vendor" includes:

"(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

"(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the State of tangible personal property or services, the use of which is taxed by this article;

"(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article; and

"(D) Any other person making sales to persons within the state of tangible personal property or services, the use of which is taxed by this article, who may be authorized by the tax commission to collect such tax by part IV of this article;

"(E) The state of New York, any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state of Canada) or political subdivisions when such entity sells services or property of a kind ordinarily sold by private persons."

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New York Tax Law, § 1105(a):

“(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.”

New York Tax Law, § 1105(c):

“(3) Installing tangible personal property, or maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except such services rendered by an individual who is engaged directly by a private home owner or lessee in or about his residence and who is not in a regular trade or business offering his services to the public, and except any receipts from laundering, dry-cleaning, tailoring, weaving, pressing, shoe repairing and shoe shining, and except for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law, and except such services rendered on or after August first, nineteen hundred sixty-five with respect to commercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs (other than with respect to articles purchased for the original equipping of a new ship); provided, however, that nothing contained in this paragraph shall be construed to exclude from tax under this paragraph or under subdivision (b) of this section any charge, made by a person furnishing service subject to tax under subdivision (b) of this section, for installing property at the premises of a purchaser of such a taxable service for use in connection with such service.”

Appendix A—Statutes of the State of New York.

New York Tax Law, § 1131(1):

“(1) ‘Persons required to collect tax’ or ‘person required to collect any tax imposed by this article’ shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership.”

New York Tax Law, § 1132(a):

“(a) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state.”

New York Tax Law, § 1133(a):

“(a) Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. Any such person shall have the same right in respect to collecting the tax from his customer or in respect to nonpayment of the tax by the customer as if the tax were a part of the purchase price of the property or service, amusement charge or rent, as the case may be, and payable at the same time; provided, however, that the tax commission shall be joined as a party in any action or proceeding brought to collect the tax.”

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New York Tax Law, § 1134. Registration.

"On or before August first, nineteen hundred sixty-five, or in the case of persons commencing business or opening new places of business after such date, within three days after such commencement or opening, every person required to collect any tax imposed by this article and every person purchasing tangible personal property for resale shall file with the tax commission a certificate of registration in a form prescribed by it. In addition to those persons required to register pursuant to the preceding sentence, on or before June first, nineteen hundred sixty-six, or in the case of persons commencing business or opening new places of business after such date, within three days after such commencement or opening, every person selling tangible personal property for resale shall also file such a certificate. The tax commission shall within five days after such registration issue, without charge, to each registrant a certificate of authority empowering him to collect the tax and a duplicate thereof for each additional place of business of such registrant. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be prominently displayed in the places of business of the registrant. A registrant who has no regular place of doing business shall attach such certificate to his cart, stand, truck or other merchandising device. Such certificates shall be nonassignable and nontransferable and shall be surrendered to the tax commission immediately upon the registrant's ceasing to do business at the place named. However, a person who is presently registered pursuant to the provisions of title G, M, N or V of chapter forty-six of the administrative code of the city of New York or under any retail sales, compensating use, consumer's utility, admissions and dues or hotel room occupancy tax imposed by a city, county or school district pursuant to the provisions of chapter two hundred seventy-eight of the laws of nineteen hundred forty-seven, as amended, need not register again under this article unless the tax com-

Appendix A—Statutes of the State of New York.

mission shall require him to do so. A person other than one described in clauses (A), (B) and (C) of paragraph (8), of subdivision (b), of section eleven hundred one, but who makes sales to persons within the state of tangible personal property or services, the use of which is subject to tax under this article, may if he so elects file a certificate of registration with the tax commission which may, in its discretion and subject to such conditions as it may impose, issue to him a certificate of authority to collect the compensating use tax imposed by this article."

New York Tax Law, § 1135. Records to be kept.

"Every person required to collect tax shall keep records of every sale or amusement charge or occupancy and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the tax commission may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately. Such records shall be available for inspection and examination at any time upon demand by the tax commission or its duly authorized agent or employee and shall be preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer."

New York Tax Law, § 1138. Determination of tax.

"(a) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors. Notice of such determination shall be given to the

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person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same. After such hearing the tax commission shall give notice of its determination to the person against whom the tax is assessed. The determination of the tax commission shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless the amount of any tax sought to be reviewed, with penalties and interest thereon, if any, shall be first deposited with the tax commission and there shall be filed with the tax commission an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding, or at the option of the applicant such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application.

“(b) If the tax commission believes that the collection of any tax will be jeopardized by delay it may determine the amount of such tax and assess the same, together with all interest and penalties provided by law, against any

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person liable therefor prior to the filing of his return and prior to the date when his return is required to be filed. The amount so determined shall become due and payable to the tax commission by the person against whom such a jeopardy assessment is made, as soon as notice thereof is given to him personally or by registered or certified mail. The provisions of subdivision (a) of this section shall apply to any such determination except to the extent that they may be inconsistent with the provisions of this subdivision. The tax commission may abate any jeopardy assessment if it finds that jeopardy does not exist. The collection of any jeopardy assessment may be stayed by filing with the tax commission a bond issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance as to solvency and responsibility, conditioned upon payment of the amount assessed and interest thereon, or any lesser amount to which such assessment may be reduced by the tax commission or by a proceeding under article seventy-eight of the civil practice law and rules as provided in subdivision (a), such payment to be made when the assessment or any such reduction thereof shall have become final and not subject to further review. If such a bond is filed and thereafter a proceeding under article seventy-eight is commenced as provided in subdivision (a), deposit of the taxes, penalties and interest assessed shall not be required as a condition precedent to the commencement of such proceeding. Where a jeopardy assessment is made, any property seized for the collection of the tax shall not be sold (1) until expiration of the time to apply for a hearing as provided in subdivision (a) of this section, and (2) if such application is timely filed, until the expiration of four months after the tax commission has given notice of its determination to the person against whom the assessment is made; provided, however, such property may be sold at any time if such person has failed to attend a hearing of which he has been duly notified, or if he consents to the sale, or if the tax commission determines that the expenses of con-

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servation and maintenance will greatly reduce the net proceeds, or if the property is perishable.

"(c) A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, concurring thereto."

New York Tax Law, § 1140. Remedies exclusive.

"The remedies provided by sections eleven hundred thirty-eight and eleven hundred thirty-nine shall be exclusive remedies available to any person for the review of tax liability imposed by this article; and no determination or proposed determination of tax or determination on any application for refund shall be enjoined or reviewed by any action for declaratory judgment, an action for money had and received, or by any action or proceeding other than a proceeding under article seventy-eight of the civil practice law and rules."

New York Civil Practice Law and Rules, § 3301. Declaratory judgment.

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds."

New York Civil Practice Law and Rules, § 6301. Grounds for preliminary injunction and temporary restraining order.

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respect-

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ing the subject of the action, and tendering to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

New York Civil Practice Law and Rules, § 6311. Preliminary injunction.

"1. A preliminary injunction may be granted only upon notice to the defendant. Notice of the motion may be served with the summons or at any time thereafter and prior to judgment. A preliminary injunction to restrain a public officer, board or municipal corporation of the state from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed.

"2. Notice of motion for a preliminary injunction to restrain state officers or boards of state officers under the provisions of this section must be upon notice served upon the defendant or respondent, state officers or board of state officers and must be served upon the attorney general by delivery of such notice to an assistant attorney general at an office of the attorney general in the county in which venue of the action is designated or if there is no office of the attorney general in such county, at the office of the attorney general nearest such county."

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-831

J. H. TULLY, JR., A. BRUCE MANLEY,
MILTON KOERNER, FRANCIS X. MALONEY and
JOHN WILLEY, *Appellants*

vs.

GRIFFIN, INC., *Appellee*

On Appeal from the United States District Court
for the District of Vermont

BRIEF FOR APPELLEE

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vs.

GRIFFIN, INC., *Appellee*

On Appeal from the United States District Court
for the District of Vermont

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

1. Was the district court correct in holding that 28 U.S.C. §1341 does not bar jurisdiction under the circumstances of this case?
2. If the District Court has jurisdiction of this case, did it abuse its discretion in granting a preliminary injunction?

SUPPLEMENTAL STATEMENT OF THE CASE

Appellee is a small Vermont furniture dealer, with total assets at the end of 1974 of less than \$260,000. (A.2) It owns no realty and has no place of business in New York. It has no sales agents or similar representatives of any sort in New York. There is no charge made for the occasional "touch-up" services performed in New York. It extends no credit to New York customers. It is not and has never been registered or qualified to do business in New York. (A.26-29)

Appellants are the three members of the New York State Tax Commission, the Director of the Sales Tax Bureau and the Bureau's Senior Tax Examiner. (A.25) Appellee brought this action only after appellants had determined that Appellee was a vendor within the applicable provisions of New York's Sales and Use Tax Law, and had notified appellee of that determination. (A.2) The tax examiners who were sent to appellee's place of business in Vermont were sent not to determine whether or not appellee was required to collect taxes, but to determine the amount of taxes due. (A.26)

After the commencement of this action in the district court, and after appellants had moved to dismiss, they caused to be issued an assessment, showing sales and use taxes due in the amount of \$218,085.37. (A.26) It was only the issuance of that assessment which led to appellee's request for preliminary relief, in order to prevent the expiration of appeal times under the New York statute (A.7-9) At the request of the district court, the first assessment was withdrawn in order to eliminate the need for a temporary restraining order. Subsequently, a second assessment of \$298,000 was issued. (A.39)

SUMMARY OF ARGUMENT

The district court was correct in determining that 28 U.S.C. §1341 does not require dismissal of this action, because the remedies available in New York State are inadequate to the task of protecting appellee's rights. The statutory tax appeal procedure is unacceptable because it would require appellee to submit to an audit by the New York Tax Department. In addition, it requires a hearing

before a Tax Commission which is not able to decide a constitutional challenge such as the one here presented, and has already determined to impose sales tax liability on appellee. Finally, in the event of an adverse determination by the Tax Commission, appellee would not be able to appeal to the courts because of the extremely burdensome requirements of the statute.

Equitable alternatives to the statutory procedure may well not be available to the appellee, in view of the strong language of the sales tax law, making the statutory remedy the exclusive means of raising even a constitutional challenge to a sales tax assessment.

Appellee should not be required to challenge this exaction in the courts of New York in any event, because doing so will strip appellee of its claims to be immune from jurisdiction in New York. A remedy is hardly plain, speedy and efficient if it requires the surrender of important rights or claims in order to exercise it.

If the district court was correct in deciding not to dismiss the action, its issuance of a preliminary injunction was no more than was required to preserve the *status quo* pending a determination on the merits.

ARGUMENT

I. 28 U.S.C. §1341 does not require dismissal of this action, because the remedies available to appellee in New York State are not plain, speedy and efficient

The provisions of 28 U.S.C. §1341, enacted in 1937, did little more than codify a long-standing principle of equity jurisdiction in the federal courts, established by such earlier cases as *Matthews v. Rogers*, 284 U.S. 521 (1932). The principle might best be described as one of restraint with respect to interference in state tax matters. The statute does not prohibit district courts from enjoining state tax proceedings; rather it directs them to inquire whether the remedies available in the taxing state are "plain, speedy and efficient." That inquiry is not made in the abstract, but instead attempts to determine whether the plaintiff has available an alternative to the federal

court which is not unduly burdensome. *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952).

In *D.C. Transit Systems v. Pearson*, 149 F. Supp. 18 (D.D.C. 1957), commenting upon Section 1341 and similar provisions of local law, the district court stated that:

In spite of the broad, sweeping language of these statutes, it had [sic] been uniformly held that they are but a restatement of the principle that equity will not interfere by injunction with the collection of a tax unless some special or extraordinary circumstance is present, justifying its interposition.... Numerous exceptions to the comprehensive ban against injunctions have been developed by judicial decisions. 149 F. Supp. at 19-20.

It is inaccurate to describe decisions which permit district courts to intervene in state tax matters as "exceptions" to the rule of Section 1341. Where there does not exist in the courts of the taxing state a reasonable remedy available to the specific plaintiff which is "plain, speedy and efficient," recourse to the federal courts implements the statute.

The nature of the inquiry to be made by the district court in deciding a motion to dismiss under Section 1341 was illuminated by the District Court for the Southern District of New York in a recent case:

In determining whether to exercise jurisdiction in a particular case, the Court must carefully weigh two countervailing considerations set forth by...[Section 1341]...:(1) a long standing policy of non-interference by federal courts in state tax matters; and (2) fairness to plaintiffs, *i.e.*, whether plaintiffs have an effective state remedy. The cases construing Section 1341 show that the broad language of the statute has been limited by numerous exceptions. Under the terms of the statute itself, a federal court must decline jurisdiction only when plaintiffs have a plain, speedy and efficient remedy in the state courts. Although the state remedy need not be the best available, its existence will not bar relief where the state remedy is

unduly burdensome. The test is whether the state remedy is adequate. (citations omitted) *United States Steel Corp. v. Multistate Tax Commission*, 367 F. Supp. 107, 115 (S.D.N.Y. 1973).

The remedies available to appellee are so deficient under principles established by the cases interpreting Section 1341 that the district court was correct in deciding to retain jurisdiction of this case.

A. New York's statutory tax appeal procedure is inadequate

Appellants assert that the procedures set forth in Section 1138 of the New York State Sales and Use Tax law (Appellants' Brief, p. A-5) are plain, speedy and efficient within the meaning of Section 1341. The first step under the statute is an administrative hearing before the State Tax Commission. In a dispute not about the amount of taxes owed, but about the constitutionally permissible reach of New York's taxing authority, the administrative hearing is inadequate to the purpose.

It is plain from the record in this case that the Tax Commissioners who would conduct such a hearing have already decided as a matter of policy to attempt to enforce this tax against appellee:

The...[appellants, including all of the members of the State Tax Commission]...maintain that...[appellee] is...required to register as a vendor, collect and remit sales taxes on those sales of tangible personal property delivered in New York State, is personally liable for sales tax not collected and remitted, and must allow examination of its records. (Defendants' Memorandum of Law, Record, document number 5, p. 3; *See also* A.12 and A.15).

It seems inappropriate at best to require appellee to go through the charade of an administrative proceeding before a body which has already decided this question against appellee.

This structural unfairness is apparently not unique to

this case. The Tax Section of the New York State Bar Association has said:

The State Tax Commission, which currently functions as adjudicator, is part of the very Department that assesses the tax and prosecutes the tax case. *New York State Bar Association, Tax Section, Annual Report* 10 (1976).

The Chairman of the Tax Section, in testimony before a Select Task Force on Court reorganization, said:

I think it is entirely fair to say that the demonstrated characteristics of our present system in New York State, universally perceived, are extreme delay, an extraordinary penchant for unnecessary and undesirable litigation, and gross unfairness and bias in the decisional process. *M. Ginsburg, Prepared Statement to the Select Task Force on Court Reorganization*, November 20, 1975.

Those comments, of course, are addressed to the general case in which the Tax Commission's bias is only the natural one of upholding the department's collection activities. The bias in the present situation is far more pernicious, where the Commission is attempting to extend the reach of its authority and jurisdiction.

Even assuming, however, that the Tax Commission has not predetermined the issues in this case, it is not at all clear that it is competent to hear constitutional issues concerning the reach of its own authority. In *Hospital Television Systems, Inc. v. State Tax Commission*, 63 Misc. 2d 705, 311 N.Y.S. 2d 568 (1970), *aff'd*, 41 App. Div. 2d 576, 339 N.Y.S. 2d 603 (1973), the court said, "clearly, a taxpayer could not argue the illegality or constitutionality of a statute before an administrative body," 63 Misc. 2d at 707.

If the Tax Commission cannot determine the constitutional issues which are the basis for appellee's objection to the imposition of these taxes, the only purpose of the administrative hearing can be to determine the amount of taxes which would be owed in the event

appellee's constitutional claim eventually fails. But in order for there to be any real hearing on the issue of the amounts involved, appellee must submit to an audit of its books and records by tax examiners of the New York State Tax Department.

This submission to an audit by an authority which appellee claims has no jurisdiction over it is a serious deficiency posed by the statutory remedy. The court in *United States Steel v. Multistate Tax Commission*, cited a similar audit requirement as a separate basis for rejecting a motion to dismiss based on Section 1341:

The second suggested course of action has another infirmity: because it is unavailable to plaintiffs until after the audits have been conducted, it might cause plaintiffs irreparable injury. Plaintiffs would be required to turn over their books and records to persons whose authority and qualifications they claim are invalid. In cases where irreparable injury would occur if no injunction were to be granted, federal courts will entertain suit. *United States Steel Corp. v. Multistate Tax Commission*, 367 F. Supp. 107, 116 (S.D.N.Y. 1973).

Appellee's alternative to submission to the audit is apparently to allow the assessment of \$298,580.59 to stand, and to be forced into an all-or-nothing battle on its constitutional defenses. Because of the requirements in Section 1138 of the Sales and Use Tax Law for posting a bond for the payment of taxes as a precondition to judicial appeal from the determination of the tax commission, the pressures on appellee to submit to this audit prior to the Tax Commission hearing would be almost irresistible.

After the proceeding before the Tax Commission, New York's statute provides for an appeal to the state court system. Section 1138, however, requires the taxpayer to "deposit" with the Tax Commission the full amount of the tax assessed, plus interest and penalties, together with a bond sufficient to cover the costs of the proceeding. Alternatively, the taxpayer may post a bond in an amount sufficient to cover the total amount of costs, tax, interest and penalties. In the event of successful appeal, the taxes, interest and penalties are returned with interest, but there

is apparently no provision for repayment by the state of the costs of the bond.

It is perfectly obvious that no corporation with total assets of less than \$260,000 could deposit \$298,000 with the Tax Commission for an indeterminate period of time. Affidavits submitted by appellee in the district court demonstrate that it is extremely unlikely that the bonding alternative is available. (A.21-24) Therefore, if appellee is required to follow the statutory procedure for contesting the assessment, an appeal from a decision of the Tax Commission is neither plain, speedy nor efficient, but simply unavailable.

The Court of Appeals for the Fifth Circuit reversed a dismissal based upon Section 1341, in *Denton v. Carrollton*, 235 F.2d 481 (5th Cir. 1956). Faced with a challenge to a municipal ordinance requiring union organizers to pay a tax of \$1,000, plus \$100 per day, the Court noted that there was some question about whether the payments could be recovered at all. Even aside from that issue, however, the Court found that the requirement of full payment before challenge took the state remedy out of the plain, speedy and efficient category.

To require the payment of any such sum as a condition to testing the validity of the exaction, if it does not of itself make the tax illegal for that reason, at least presents such a heavy burden that to decline equitable relief would be to deny judicial relief altogether. 235 F.2d at 485.

The statutory remedy, as it is available to this taxpayer, consists of an administrative hearing before Commissioners who have already decided to impose the tax on appellee, and who are probably not competent to decide appellee's constitutional issues, requiring an audit by an authority whose jurisdiction is contested by appellee, all followed by an appeal to the courts, which because of the statutory deposit or bonding requirements will be unavailable to appellee in any event.

Appellants correctly point out that a substantial body of case law has held refund procedures in general, and New York's in particular, to be adequate. But those cases, and other, similar decisions, are not applicable here because

of a fundamental difference between a sales tax and other kinds of taxes.

The retail store is not, in the first instance, the taxpayer. Rather the retailer is only the collector of the tax, which is actually paid by the retail purchaser. The imposition of secondary liability upon the retailer is merely a means of assuring that the collection function would be fulfilled.

Other taxes, particularly property and income taxes, are imposed upon the individual or entity which is principally liable for the payment of the tax, and collected directly by the taxing authority. Such taxes are measured (at least in theory) by a standard considered to be a fair test of the taxpayer's ability to pay the tax. Thus, for example, it may not be too great a burden to require deposit of income tax assessments prior to judicial review, because the tax is based upon income received by the taxpayer, who therefore has the money available for deposit.

In the present case, however, where the very question in dispute is whether plaintiff is obligated to provide collection services for New York, the deposit burden is substantially greater than it is in income tax or property tax disputes, precisely because the plaintiff has never received or had the benefit of the funds which the state insists it should deposit.

The cases which appellants cite in support of the proposition that the statutory remedies are "adequate" miss the point of Section 1341, for the test is not to be applied in the abstract, and none of the cases cited by appellants is controlling in this particular situation. For example, *American Commuters Association v. Levitt*, 405 F.2d 1148 (2nd Cir. 1969) was a challenge, on equal protection grounds, to the imposition of New York's individual income tax upon non-residents employed in New York. Noting that a substantial body of precedent upheld the validity of the tax, the court held that a refund suit was an adequate remedy. Plaintiffs in that case contended that the requirement of a bond to secure court costs was burdensome, but raised no issue of the need to deposit taxes, presumably because the taxes had already been withheld by the plaintiffs' employers.

Hickman v. Wujick, 488 F.2d 875 (2nd Cir. 1973) was a

challenge by taxpayers who sought a credit against local property tax payments in an amount equal to tuition they paid to a private school. Dismissal was required because the statutory appeal procedures for property tax assessments, together with the clear availability of declaratory relief to challenge the local tax were found to be acceptable.

While as a general rule it may be permissible for states to require taxpayers to contest assessments from a refund posture, the district court was correct in concluding that, under the circumstances of this case, to deny the intervention of the federal court would be to risk denying appellee any remedy whatever.

**B. No alternative to the statutory
proceeding is clearly available to appellee
in New York**

Appellants have asserted at each stage in this proceeding that while the statutory procedures may be inadequate, dismissal is required because a declaratory judgment proceeding in New York courts is clearly available to appellee as an alternative. The district court concluded that the availability of a declaratory judgment proceeding was clouded with such uncertainty that dismissal was not required.

Section 1140 of the Sales and Use Tax Law provides:

1140. REMEDIES EXCLUSIVE. The remedies provided by sections eleven hundred thirty-eight and eleven hundred thirty-nine shall be *exclusive remedies* available to any person for the review of tax liability imposed by this article; and *no determination or proposed determination* of tax or determination on any application for refund shall be *enjoined or reviewed by an action for declaratory judgment*, an action for money had and received, or by an action or proceeding other than a proceeding under Article seventy-eight of the Civil Practice Law and Rules. (emphasis added)

Despite the extraordinarily clear and emphatic command of that statute, appellants insist that appellee may bring a declaratory judgment proceeding, and cite in

support of that proposition a number of cases in which New York courts have allowed declaratory judgment proceedings in tax contests. Those cases do not stand for a general proposition that any plaintiff may elect to seek declaratory relief instead of following the statutory procedures. They show at most that the courts of New York may, in certain limited circumstances, allow declaratory relief as an alternative to the refund procedures.

Most of the cases cited by appellants in support of their claim that declaratory judgment is available were decided under statutory provisions significantly different from Section 1138. The earliest cases supporting the availability of declaratory relief in New York were decided under the New York City sales tax. For example, *Socony-Vacuum Oil Co. v. City of New York*, 247 App. Div. 163, 287 N.Y.S. 288 *aff'd mem.*, 272 N.Y. 668, 5 N.E. 2d 385 (1936), permitted a declaratory judgment action to challenge a regulation promulgated by the Comptroller of the City of New York with respect to the proper treatment for sales tax purposes of Federal and state excise taxes; but the sales tax statute did not state that its remedies were to be exclusive. The court cited "extraordinary circumstances" to justify the declaratory judgment action. 287 N.Y.S. at 292-293. Similarly, *Dun & Bradstreet, Inc. v. City of New York*, 276 N.Y. 198, 11 N.E. 2d 728 (1937), involved a statute which was silent as to exclusivity.

Hudson Transit Lines, Inc. v. Bragalini, 11 Misc. 2d 1094, 172 N.Y.S. 2d 423 (1958) and *Slater v. Gallman*, 38 N.Y. 2d 1, 377 N.Y.S. 2d 448, 339 N.E. 2d 863 (1975), were decided under the provisions of Section 199 of the New York Tax law, which provides a remedy stated to be exclusive. But the statute states that the prescribed review procedure shall be followed where it is contended that a tax is "erroneous or illegal," and thus does not speak to the issue of the proper method of review when an exaction is challenged as unconstitutional.

Booth v. City of New York, 268 App. Div. 502, 52 N.Y.S. 135 (1944), *aff'd*, 296 N.Y. 573, 68 N.E. 2d 870 (1946); *First National City Bank v. New York Finance Administration*, 36 N.Y. 2d 87, 365 N.Y.S. 2d 493, 324

N.E. 2d 861 (1975); and *Yonkers Raceway, Inc. v. City of Yonkers*, 30 N.Y. 2d 913, 335 N.Y.S. 2d 568, 287 N.E. 2d 274 (1972), all involved local taxes in which the section of the local tax law which provided for the exclusivity of remedies was not authorized by the enabling statute, and was therefore not enforceable. 268 App. Div. at 507.

Unlike all of the statutes involved in the cases cited so far, Section 1138 of the Sales and Use Tax Law specifically provides that the statutory remedy is to be used for constitutional challenges. This change from earlier statutes clearly indicates an attempt by the legislature to prevent the use of declaratory judgment proceedings to make constitutional challenges to tax statutes, and to require even those challenges to follow the statutory process.

The only case cited by appellants for the proposition that a declaratory judgment proceeding will be permitted in the face of the specific provisions of Section 1138 is *Hospital Television Systems, Inc. v. State Tax Commission*, 63 Misc. 2d 705, 311 N.Y.S. 2d 568 (1970), *aff'd*, 41 App. Div. 2d 576, 339 N.Y.S. 2d 603 (1973). Although the opinion of the appellate division in that case contains some general language indicating that statutory procedures need not be followed in every case, the specific question before the court did not involve a declaratory judgment, but rather the question of whether a taxpayer who did not contest the amount of taxes alleged to be due, could skip the administrative proceedings and go directly to an Article 78 judicial proceeding.

It is important to note that the New York courts do insist upon strict adherence to the statutory procedures in many circumstances. For example, in *Mutual Life Insurance Co. v. State Tax Commission*, 24 App. Div. 2d 853, 264 N.Y.S. 2d 862 (1965), *aff'd mem.*, 17 N.Y. 2d 736, 270 N.Y.S. 2d 205, 217 N.E. 2d 31 (1966), the insurance company brought a declaratory judgment proceeding challenging on constitutional grounds the imposition of certain franchise taxes on insurance premiums paid for the benefit plan operated by the insurance company for its employees. The supreme court granted a motion to dismiss on the grounds that the statute provided an exclusive remedy, and the appellate division and the

Court of Appeals upheld the dismissal. Similarly, in *Peters v. State Tax Commission*, 18 App. Div. 2d 886, 237 N.Y.S. 2d 613 (1963), *aff'd mem.*, 13 N.Y. 2d 1148, 247 N.Y.S. 2d 139, 196 N.E. 2d 568 (1964), the appellate division and the Court of Appeals upheld the dismissal of a declaratory injunction proceeding in favor of the statutory tax appeal procedure.

Section 1138 and 1140, taken together, represent an extremely clear statement by the legislature that the remedy set forth in the sales tax statute is to be exclusive, regardless of the nature of the challenge to the tax. In the face of such a strong statutory position, appellants have not demonstrated with any certainty that appellee would not be held to the statutory remedy in order to litigate in New York, and there is, therefore, considerable uncertainty with respect to the availability of equitable alternatives to the statutory remedy in New York State.

Cases in which there is uncertainty as to the availability of equitable alternatives to burdensome statutory procedures have regularly been held to be outside the injunction ban of Section 1341. In *Adams County v. Northern Pac. Ry. Co.*, 115 F. 2d 768 (9th Cir. 1940), the court noted that although the state courts had sometimes allowed equitable relief, its availability was not absolutely certain, and concluded:

If the remedy is doubtful, it does not deprive the federal court of jurisdiction. *Corporation Commission v. Cary*, 296 US 452, 453, 56 S.Ct. 300, 80 L.Ed. 324; *Mountain States Power Co. v. Public Service Commission of Montana*, 299 U.S. 167, 170, 57 S.Ct. 168, 81 L.Ed. 99; *Driscoll v. Edison Co.*, 307 U.S. 104, 110, 59 S.Ct. 715, 83 L.Ed. 1134. 115 F. 2d at 775.

This Court, in *Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944), a Commerce Clause attack on Connecticut's corporate franchise tax by an interstate trucking company, while reversing on other grounds, upheld the district court's decision to hear the case, because of conflicting Connecticut precedents as to the availability of equitable relief.

This Court held that uncertainty surrounding the availability of adequate remedies permitted the district

court to intervene despite Section 1341 in *Township of Hillsborough v. Cromwell*, 326 U.S. 620 (1946). In that case, there were conflicting precedents shrouding in uncertainty the availability of appropriate procedures in the state courts, and the uncertainty was sufficient, in the Court's view, to permit the district court to take jurisdiction.

In the face of language as clear as that of Section 1140 the federal courts are not required to speculate about the willingness of New York courts to ignore the statute, particularly when appellants can point to no decision of the highest court of New York which clearly demonstrates that declaratory judgment would be available to appellee despite the exclusivity provision of the statute.

In addition to uncertainty over whether it is available at all, another difficulty with the declaratory judgment proceeding suggested by appellants is the inability of the New York courts to grant injunctive relief. Appellants caused a tax assessment to be issued against appellee after the commencement of this action. Without injunctive relief, under Section 1138 of the Sales and Use Tax Law, at the end of 90 days the assessment becomes final unless the statutory tax appeal procedure is invoked prior to that time. Therefore, in the absence of injunctive relief, appellee may have to attempt to bring a declaratory judgment proceeding in New York State only at the expense of losing forever its right to contest the amount of taxes due, should it be finally determined that its constitutional objections are not controlling.

In support of the proposition that injunctive relief would be available, appellants do no more than set forth the general statutory provisions which grant ordinary equity powers to the New York courts. They cite no authority which holds out even the slightest hope that injunctive relief would be permitted in the face of the clear prohibition against such relief contained in Section 1140.

In order to contend here, for the purpose of demonstrating the adequacy of New York remedies, that injunctive relief would be available in this case, it is incumbent upon appellants to demonstrate that the New York Courts will not enforce the anti-injunction provisions of Section 1140.

C. Regardless of the remedies available in New York State, appellee should not be required to litigate there

Defendants rely heavily upon the decision of a three judge District Court in *Ammex Warehouse Co., Inc. v. Galiman*, 72 Civ. 306, 310 (N.D.N.Y., Mar. 16, 1973), *aff'd mem.*, 414 U.S. 802. (1973) The *Ammex* court seems to have considerably overestimated the certainty that declaratory relief would be available, but there is another distinction which makes that decision inapposite here. *Ammex* operated eight sales facilities in the state of New York. Its claim for tax exemption was based upon the Commerce Clause and the Import-Export Clause, but not upon the Due Process Clause. Since *Ammex* was physically present and doing business in New York, the burden of requiring it to seek a questionable remedy in the state courts may not have been very harsh. A corporation with such extensive facilities in New York State could reasonable be expected to litigate in New York courts. But to force appellee, which has contacts with New York described by the district court as "minimal", to litigate in New York State is a result which neither Section 1341 nor common sense require.

The policy of restraint embodied in Section 1341 is based upon two separate considerations. One is a reluctance to interfere in the revenue-collecting activities of a state because of the fundamental importance of those activities to state government. It also reflects, however, a more general federal policy of non-interference in the relationship between a state and its citizens, or others over whom the state properly exercises jurisdiction. This general policy, for example, is applied to criminal prosecutions by such cases as *Younger v. Harris*, 401 U.S. 37 (1971). But where, as here, the record indicates substantial doubt as to whether New York has jurisdiction over the appellee at all, and this case challenges the tax specifically on due process grounds, there is no good reason to require appellee to pursue dubious remedies in the state courts.

To require appellee to follow either of the procedures suggested by appellants would almost certainly expose

appellee to the full jurisdictional power of the New York state courts, to which appellee might not otherwise be subject.

If appellee's contentions on the merits are sound, it is unlikely that any court in the State of New York has jurisdiction over appellee sufficient to issue an enforceable judgment against it in a suit brought by the state to collect the taxes here at issue. Yet in order for appellee to avail itself of the remedy proposed by appellants, appellee would immediately subject itself to jurisdiction in New York, in the absence of a procedure such as a special appearance.

The district court in *United States Steel Corp. v. Multistate Tax Commission*, 367 F. Supp. 107, 116 (S.D.N.Y. 1973), refused to dismiss the complaint on the basis of Section 1341, partly because remedies proposed by the defendants would have required the plaintiffs to submit to audits by persons whose authority was questionable. To make appellee surrender all its defenses to the jurisdiction of New York's courts in order to obtain any relief is even more burdensome.

Appellee's alternative would be not to contest the New York assessment, but to interpose its constitutional jurisdictional objections when and if New York should seek to enforce its claims in Vermont. But the burdens of such an approach are clear. Not only would appellee's business suffer the consequences of the uncertainties surrounding the tax assessments for an extended period of time, (A.21-24), but appellee would lose forever its ability to challenge the amount of the taxes due, in the event its constitutional defenses should fail.

The district court held that appellee's limited contacts in New York state constituted a "counterweight to the reasons for requiring a taxpayer to raise his objections to an assessment in the courts of the taxing state." (A.50) This "counterweight", in the district court's analysis, requires a higher degree of assurance that the state's remedies are adequate than might be demanded in the case of the in-state challenger. This seems an appropriate balancing of the competing concerns at stake. While it might be perfectly reasonable federal policy to force those with a clearly established presence in a state to contend

with problems arising from indistinct remedies, there appears to be no good reason for imposing such burdens on those who have no established activities in the state.

II. The district court was correct in granting appellee's motion for a preliminary injunction.

If the district court was correct in determining that 28 U.S.C. §1341 does not require that this action be dismissed, there can be no question about the propriety of the issuance of a preliminary injunction. The only inquiry on appeal from the grant of an interlocutory injunction is whether the court below abused its discretion. *U.S. v. Corrick*, 298 U.S. 435, 437 (1936).

Appellee did not seek preliminary relief in the district court until the appellants, some three weeks after the action was commenced, caused to be issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due," running from August 1, 1965, and totalling \$218,085.37 in taxes, penalties and interest. Under New York's taxing statutes, the issuance of the Notice begins a 90 day period within which an application for a hearing may be filed with the State Tax Commission, and at the end of which the amount becomes fixed and incontrovertible.

The issuance of the Notice represents the commencement of the entire tax collection proceeding, which may involve lawsuits, personal liability on the part of certain officers of appellee, seizure of property of appellee (such as trucks) which the appellants might happen to find within the boundaries of New York State, and similar activities.

In addition, the existence of the liabilities for an extended period of time represents a significant threat to appellee's ability to conduct its business in a normal manner during the pendency of the dispute, as was demonstrated by affidavits submitted in the district court proceeding. (A.21-23)

On the other hand, there has been no showing of, and it is difficult to imagine, any significant harm to appellants resulting from the delay pending a determination of appellee's claims. The common complaint against

enjoining state tax proceedings is that it interferes with the important state business of collecting revenues. In this case, however, the following exchange during the hearing before the three-judge court suggests that the current tax enforcement proceeding is not a revenue measure at all:

MR. ZOLEZZI: In the present case the complaint was made to the New York State Department of Taxation by a local furniture merchant who says, "Merchants are coming into the state, they are selling articles and they are not charging tax. I have to charge tax which automatically makes my prices higher than theirs. Even if I was to charge the same amount, I have to charge tax and they are invading our area."

Based on that, that's when the New York State Department of Taxation and Finance went out to investigate the complaint and, I seriously doubt that the Department of Taxation would hit every out of state merchant to determine whether he was making deliveries into the state.

JUDGE OAKES: They would only hit those where there was a complaint by the local merchant?

MR. ZOLEZZI: By the local merchant.

JUDGE OAKES: Which might be great in number or small in number?

MR. ZOLEZZI: It's possible. (A.32-33)

In *Miller Bros. v. Maryland*, 347 U.S. 340 (1954), this Court considered a situation nearly identical to that presented by this case. A Delaware furniture store made sales to residents of Maryland, who sometimes took their purchases with them, and sometimes had the store deliver the items by its own trucks or by common carrier. This Court upheld the contention of Miller Brothers that it was protected against the Maryland sales tax by the Commerce and Due Process Clauses.

In 1967 this Court, in *National Bellas Hess v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967), discussed *Miller Bros.* and other cases and, in

rejecting the argument of the State of Illinois, stated that in order to impose the tax on National Bellas Hess, it would have to:

...repudiate totally the sharp distinction which... [*Miller Bros.*]...and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a state, and those who do no more than communicate with customers within the state by mail or common carrier as part of a general interstate business. But this basic distinction, which has until now been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it. 386 U.S. at 758.

It is not necessary to pre-judge the ultimate disposition of this case on the merits to determine that, on the present state of the record, plaintiff's chances of success on the merits are sufficient to satisfy that traditional requirement for a preliminary injunction.

CONCLUSION

The remedies available to appellee should it be forced to litigate in New York are neither plain, speedy nor efficient. To require appellee to carry this fight into New York at all would require the surrender of important rights. The preliminary injunction is a necessary and reasonable measure to protect appellee during the litigation. The order of the district court should be affirmed in all respects.

Dated at Bennington, Vermont, May 6, 1976.

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